

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CARL DEMETRIUS MITCHELL,  
Petitioner,  
vs.  
RON CHAMPION, et al.,  
Respondents.

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No. 92-C-127-K

FILED

JAN 10 1995

ORDER

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

On November 16, 1994, the Court granted Petitioner an opportunity to dismiss voluntarily his petition as moot or to submit arguments in support of his claim, if any, that the appellate delay violated his due process and/or equal protection rights. See Harris v. Champion, 15 F.3d 1538, 1558-1568 (10th Cir. 1994) (Harris II). On December 2, 1994, Petitioner timely filed his brief in support of his appellate delay claims. He alleged that he was entitled to a writ of habeas corpus even though both of his convictions were affirmed. Petitioner also alleged that he was entitled to the appointment of counsel. Respondent has objected to Petitioner's response.

The Tenth Circuit Court of Appeals has made clear that if a Petitioner's conviction has been affirmed, as in this case, federal habeas corpus relief on the basis of inordinate delay alone is not an available remedy unless the Petitioner shows "actual prejudice to the appeal, itself, arising from the delay." Harris II, 15 F.3d at 1566. The Circuit, quoting from Diaz v. Henderson, 905 F.2d 652, 653 (2nd Cir. 1990), reasoned:

An untainted affirmance of a petitioner's state appeal

while his habeas petition is pending makes clear that the petitioner was confined pursuant to a valid judgment of conviction throughout the period of delay. The affirmance established that if the delay had not occurred and petitioner's due process right to a timely appeal had been fully satisfied, he would have been subject to exactly the same term of confinement. Because the due process violation did not result in an illegal confinement, it cannot justify granting the habeas remedy of unconditional release.

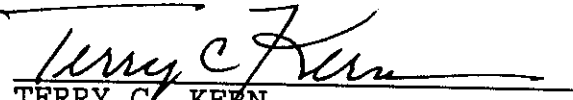
Harris II, 15 F.3d at 1566 (10th Cir. 1994).

The Court finds the above reasoning applicable to the case at hand although Petitioner was represented on direct appeal by the Tulsa County Public Defender's Office instead of the Oklahoma Indigent Defense System. See Taylor v. Steve Hargett, 27 F.3d 483 (10th Cir. 1994) (applying the Harris II standard although petitioner was represented by retained counsel on direct appeal); see also Strickland v. Keothane, CIV-92-197-A (W. Dist. Okla. Apr. 19, 1994).

After carefully reviewing Petitioner's response and the exhibits attached thereto, the Court concludes that Petitioner has not established that, but for the appellate delay, his appeal would have been decided differently. See Harris II, 13 F.3d at 1566 (citing Mwwakkil v. Hoke, 968 F.2d 284, 285 (2d Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 664 (1992)). Accordingly, Petitioner's petition for a writ of habeas corpus on the basis of appellate delay is hereby **denied**. The Court holds, however, that this denial is without prejudice to Petitioner filing of a separate pro se action to pursue any other non-delay constitutional claims that he might have with regard to his convictions in CRF-87-36 and

CRF-87-876.

SO ORDERED THIS 18 day of January, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

**FILED**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA JAN 19 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

LAB SCIENCES, INC.

Plaintiff,

vs.

ORAL ROBERTS UNIVERSITY

Defendant.

No. 94-C-758-K

**ORDER**

Now before this Court is the Motion by Defendant Oral Roberts University to dismiss the complaint of Plaintiff, Lab Sciences, Inc., for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

This dispute involves the alleged non-payment by Oral Roberts University for a piece of laboratory equipment. The amount in controversy as stated by Plaintiff is \$3649.50.


This Court does not have subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because the action does not arise under the Constitution, laws, or treaties of the United States.

This Court does not have subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because the amount in controversy in this action does not exceed the sum of \$50,000.

Plaintiff's complaint fails to allege any grounds upon which this Court's jurisdiction depends as is required by Rule 8(a) of the Federal Rules of Civil Procedure.

For the reasons state above, the Motion to Dismiss is granted.

ORDERED this 18 day of January, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD E. O'DELL and  
PAULA O'DELL, husband and  
wife,

Plaintiff,

vs.

WILLIAM THOMAS MCCOLLOUGH  
and SUN REFINING AND MARKETING  
COMPANY

Defendant.

No. 93-C-754-K

**FILED**

JAN 20 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now before this Court is Plaintiffs' Motion to Remand. Defendants William Thomas McCollough ("McCollough") and Sun Refining and Marketing Company ("Sun") oppose remand and argue that this case has been properly removed to federal court.

**FACTS**

This case arises out of a related action previously tried in the Northern District of Oklahoma in which the Plaintiffs claimed personal injuries resulting from exposure emitted from Sun's refinery in 1988. After trial, the jury found in favor of the Plaintiffs but awarded only one dollar in damages. Plaintiffs appealed to the Tenth Circuit.

One year later, Plaintiffs moved to vacate the judgment under Fed.R.Civ.P 60(b) alleging (1) newly discovered evidence, and (2) fraud, misrepresentation and misconduct of Sun, its counsel, and certain employees, including McCollough. Plaintiffs claimed that

McCollough, who served as Manager of the refinery owned and operated by Sun, concealed facts and committed fraud at the original trial ("O'Dell I"). The Court denied Plaintiffs' Motion to Vacate on the basis that the appeal divested it of jurisdiction. The Tenth Circuit dismissed for lack of prosecution Plaintiffs' appeal from the trial court's decision in O'Dell I as well as their appeal from the Court's denial of Plaintiffs' Motion to Vacate.

#### DISCUSSION

The current action essentially restates the claims made by Plaintiffs in their Motion to Vacate. Plaintiffs have set forth twenty separate counts alleging perjury by McCollough during the trial of O'Dell I and further argue that Sun is liable on a respondeat superior theory.<sup>1</sup> Plaintiffs seek compensatory and punitive damages for the loss allegedly suffered in light of the jury's reliance on the false testimony of McCollough and the resulting verdict in Plaintiffs' favor for only one dollar.

Defendants rely principally on the doctrine of ancillary jurisdiction in support of their argument that a federal court is the appropriate forum for the instant dispute. Under the doctrine of ancillary jurisdiction, a federal court may exercise jurisdiction over a claim for which no subject matter jurisdiction independently obtains if the claim is sufficiently related to an initial claim properly before the court. Chesley v. Union Carbide

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<sup>1</sup>Plaintiffs voluntarily dismissed the attorneys originally included in the Complaint who had been accused of suborning perjury.

Corp., 927 F.2d 60, 64 (2d Cir. 1991). The decision to hear an ancillary claim is discretionary and turns upon judicial economy, convenience, and fairness to the litigants. Id.

These factors of judicial economy, convenience, and fairness have also been emphasized by the Tenth Circuit in assessing whether ancillary jurisdiction is appropriate. In Jenkins v. Weinshienk, the Tenth Circuit reviewed the factors used by courts to delineate the boundaries of those matters that are within the court's ancillary jurisdiction. 670 F.2d 915, 918 (10th Cir. 1982), citing Morrow v. District of Columbia, 417 F.2d 728, 740 (D.C.Cir. 969).

The Jenkins court said that:

- 1) an ancillary matter should arise from the transaction that was the basis of the principal proceeding, during the course of the principal proceeding, or as an integral part of the main proceeding;
- 2) the federal court should be able to determine the matter without a substantial new fact-finding proceeding;
- 3) failing to determine the matter should not deprive a party of an important procedural or substantive right; or
- 4) the matter should be decided in order to protect the integrity of the principal proceeding or insure that its disposition is not frustrated.

Interestingly, these factors are taken directly from the Morrow decision, but in Morrow the court required all the factors to be present in order to justify ancillary jurisdiction. The Tenth Circuit, in citing Morrow, provides no explanatory comment but connects the four factors with "or" rather than "and" as used in Morrow. Other courts have required all factors to be present. See Bankers Trust Company v. Worldwide Transportation Services, 537 F. Supp. 1101, 1112 (requiring all four factors to be present for



ancillary jurisdiction to be assumed). Notwithstanding this confusion over the law of ancillary jurisdiction in the Tenth Circuit, these factors help to guide the Court in evaluating the arguments concerning removal of the action to federal court.

The first factor clearly weighs in favor of removal. The ancillary matter, i.e., the alleged perjury, arose during the course of the principal proceeding.

The second factor weighs against removal, since the amount of new fact-finding required to resolve the perjury issues will be substantial. While it is true that the Northern District possesses the trial transcripts of O'Dell I, the matters to be resolved will involve a factual investigation by a new jury of a very different sort. McCollough testified in O'Dell I on April 22, 1991 and April 26, 1991. Now, Plaintiffs allege that this testimony was false and perjurious. The production of the transcripts constitute only a part of the potential action. The more substantial aspect of the claim will require evidence demonstrating that the testimony was false and that McCollough knew it was false or acted recklessly with the intention that the jury would rely on the statements. One crucial aspect of the case against McCollough will involve whether Sun had been engaged in processing "sour crude" for a period of time prior to the incident. While McCollough denied such processing of sour crude, the Plaintiffs plan to use a report allegedly prepared by Mark Kuhn discussing the extent of sour crude processing at the plant. Furthermore, Plaintiffs state in the Complaint that McCollough received a copy of this report prior to

the dates of his testimony. As this example demonstrates, the jury will be involved in substantial new fact-finding in order to determine McCollough's liability for perjury.

Third, the Defendants will not be deprived of any substantial right if this Court refuses to hear the dispute under principles of ancillary federal jurisdiction. Instead, the Defendants will simply have the issue determined in state court. There has been no showing that a remand of this case to state court will in any way deprive the Defendants of a substantive or procedural right.

Fourth, the Court should consider the issue of the integrity of the judicial proceeding in O'Dell I. There has been very little case law exploring the meaning of this factor. However, it appears that this factor is essentially concerned with the court's enforcement powers. In other words, the rationale contemplates that federal courts should have jurisdiction to ensure that its powers are given full effect and are not compromised. Morrow, 417 F.2d at 172; U.S. v. Brant, 684 F. Supp. 421, 425 (M.D.N.C. 1988). Under this interpretation of the integrity factor, it is not clear that an allegation of perjury compromises the integrity of the district court. "The major purpose of ancillary jurisdiction is to ensure that a judgment of a court is given full effect." Bankers Trust, 537 F. Supp. at 1112. While the allegation clearly raises an issue as to the integrity of McCollough, it does not necessarily impugn the powers of the court itself.

Finally, it is important to note that the perjury claim would require this Court to immerse itself in a complicated, undeveloped,

and very important area of state law, namely the existence under Oklahoma law of a civil perjury cause of action. To the extent that the doctrine of ancillary jurisdiction is designed to promote efficient packaging of litigation, this nuanced question of state law would be better resolved in the state courts. See 3 Moore's Federal Practice ¶ 14.26. This same concern is reflected in the recent statutory changes made by Congress regarding federal jurisdiction. Congress approved the Judicial Improvement Act of 1990 in which it authorized federal courts to utilize "supplemental jurisdiction" over all other claims that are related to claims over which the court has original jurisdiction. 28 U.S.C. § 1367(a). At the same time, the Congress provided that a district court may decline to exercise supplemental jurisdiction where the new claim raises a "novel or complex issue of State law." 28 U.S.C. § 1367(c). The Defendants have made clear that an important issue in this case involves conflicting decisions in the Oklahoma state courts concerning whether a plaintiff has a civil cause of action under Oklahoma law for the tort of perjury committed by a witness during a court proceeding. Defendants' Motion to Dismiss at p. 7-8. Similarly, Plaintiffs have squarely stated that they make their claim under the theory that a state law cause of action for perjury would be recognized by the Oklahoma Supreme Court. Knowing that this case will necessarily entail examination of this complex state law issue, the public interest weighs in favor of having jurisdiction vested in the state courts.

The arguments for ancillary jurisdiction are ultimately not

persuasive. The Second Circuit cases cited by Defendants, Chesley v. Union Carbide Corp., 927 F.2d 60 (2d Cir. 1991) and Cresswell v. Sullivan & Cromwell, 922 F.2d 60 (2d Cir. 1990), do not involve the same inconvenience and policy concerns that are encountered in the instant case. Therefore, those cases do not convince this Court that ancillary jurisdiction should be exercised in this instance.

Alternatively, Defendants argue that this matter has raised a general federal question and, as a result, this Court has jurisdiction. In making this argument, Defendants rely on Villareal v. Brown Express Inc., 529 F.2d 1219 (5th Cir. 1976), a case involving a similar factual dynamic as the one at bar. However, the Tenth Circuit, in Fajen v. Foundation Reserve Insurance Company, Inc., 683 F.2d 331, 334 (10th Cir. 1992), sought to limit the applicability of Villareal. In Fajen, the Tenth Circuit articulated a presumption against removal, saying that doubts concerning removal should be resolved against it. The Court stated:

Removal statutes should be strictly construed and, and all doubts are to be resolved against removal. This circuit has held that to support removal jurisdiction, the "required federal right or immunity must be an essential element of the plaintiff's cause of action, and that the federal controversy must be 'disclosed on the face of the complaint, unaided by the answer or by the petition for removal.'"

Fajen, 683 F.2d at 333 (Citations omitted). Moreover, it is important to note that Villareal can be distinguished from the current case because diversity existed between the parties in Villareal in contrast to the instant litigation where there could

be no diversity jurisdiction between the parties.

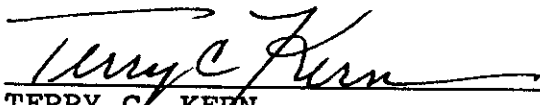
The Plaintiffs not only seek remand to the state court but also to impose costs, including attorney fees, on the Defendants occasioned by the removal to this Court. The removal statute provides:

If at anytime before final judgment it appears that the district court lacks subject matter jurisdiction the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of removal.

28 U.S.C. §1447(c). The district court has wide discretion in declining to award fees and costs. Daleske v. Fairfield Communities, Inc., 17 F.3d 321, 324. As the Tenth Circuit has held, "the propriety of the defendant's removal continues to be central in determining whether to impose fees." Miranti v. Lee, 3 F.3d 925, 928 (5th Cir. 1993), cert. denied, 114 S.ct. 1832. This action arises directly from a previous federal court case, and the argument for removal enjoys support in the law of the Second Circuit. In seeking to remove this case, Defendants acted on a supportable theory and acted in good faith. Therefore, this Court need not impose on Defendants the costs and fees incurred by the Plaintiffs in litigating the removal of this action.

For the reasons discussed above, the Plaintiffs' Motion to Remand is granted and this case is remanded to the District Court of Tulsa County. The request by Plaintiffs for costs and attorney's fees is denied.

ORDERED this 19<sup>th</sup> day of January, 1995.

A handwritten signature in cursive script, reading "Terry C. Kern", written over a horizontal line.

TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 19 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ROBERT L. GLOVER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 94-C-995-E
	)	(89-CR-56-E)
RONALD THOMPSON, WARDEN,	)	
	)	
Respondent.	)	

**ORDER**

In October 1994, Petitioner filed a motion for leave to proceed in forma pauperis and a petition for a writ of habeas corpus by a person in federal custody pursuant to 28 U.S.C. § 2241. He alleged that his sentence in 89-CR-56-E should be reduced under United States v. Patrick, 983 F.2d 206 (11th Cir. 1993). On November 23, 1994, the Government filed its response treating the petition as a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. The Petitioner has not filed a reply.

After carefully reviewing the petition and the response, the Court concludes that the petition should be construed as a motion to vacate, set aside, or correct sentence by a person in federal custody under 28 U.S.C. § 2255. Although the substance of Petitioner's claim for relief is before the Court in the instant petition, all further proceedings should be docketed in the criminal case and reviewed by the sentencing court.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) The petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 is **construed** as a motion to vacate, set


ENTERED ON DOCKET

DATE 1-20-95

aside, or correct sentence under 28 U.S.C. § 2255;

- (2) The Clerk shall administratively **close** the above captioned case and **docket** the section 2255 motion (doc. #1) and the Government's response (doc. #4) in Case No. 89-CR-56-E;
- (3) All further proceedings shall be **docketed** in the criminal case only.

SO ORDERED THIS 19<sup>th</sup> day of January, 1995.

  
JAMES O. ELLISON, Senior Judge  
UNITED STATES DISTRICT COURT



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 19 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

KENNY TOLBERT, individually;  
and TOLBERT ENTERPRISES, INC.,  
an Oklahoma corporation,

Plaintiffs,

v.

THE TRAVELERS INSURANCE  
COMPANY, a Connecticut  
corporation; KUCHARSKI  
PROPERTIES, INC., an  
Oklahoma corporation; and  
BOB KUCHARSKI, an individual,

Defendants.

Case No. 94-C-620-B

ENTERED ON DOCKET

DATE 1-20-95

JOINT DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), the parties hereby  
jointly dismiss the captioned case.

DOUGLAS L. INHOFE, OBA No. 4550  
MARK A. WALLER, OBA No. 148311

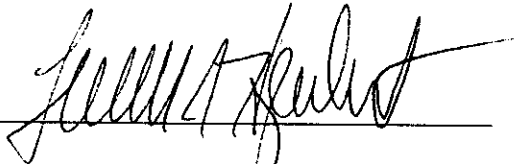
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COMPANY

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

SUN COMPANY, INC., (R & M), a Delaware corporation, )  
and TEXACO INC., a Delaware corporation, )

Plaintiffs, )

vs. )

BROWNING-FERRIS, INC., a Delaware corporation, et al., )

Defendants. )

JAN 19 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

Case No. 94-C-820-B

ENTERED ON DOCKET

DATE JAN 20 1995

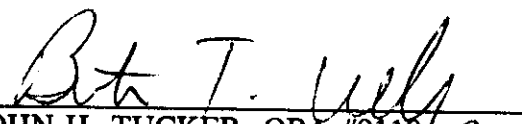
**NOTICE OF DISMISSAL WITHOUT PREJUDICE**

Plaintiffs, Sun Company, Inc. (R & M) and Texaco, Inc. hereby dismiss Defendant,  
ANCHOR STONE CO., ONLY without prejudice.

Dated this 19th day of January, 1995.

RHODES, HIERONYMUS, JONES  
TUCKER & GABLE

By

  
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DATE JAN 19 1995IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANDREW DUNCAN,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 94-C-119-B

**FILED**

JAN 19 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURTORDER

At issue before the Court is Petitioner's pro se petition for a writ of habeas pursuant to 28 U.S.C. § 2254. In his petition, Petitioner raises two issues: (1) that the Oklahoma Indigent Defense System has failed to perfect his direct appeal, and (2) that the trial testimony of various defense witnesses was not transcribed and made part of the appellate record. In the Rule 5 response, Respondent contends that Petitioner's application for habeas corpus relief should be dismissed because Petitioner's direct appeal has now been perfected and is at issue before the Court of Criminal Appeals and the direct appeal record contains the testimony which Petitioner alleges to have been omitted. The Petitioner has not filed a reply. For the reasons stated below, the Court concludes that the petition should be denied.

**I. BACKGROUND**

On June 27, 1988, Petitioner received a life sentence for the crime of murder in the first degree in Adair County District Court, Case No. CRF-87-133. A Notice of Intent to Appeal was filed on the

same day. The Oklahoma Indigent Defense System (OIDS), however, did not receive notice of appointment to represent the Petitioner until July 16, 1993, by which date the time to perfect the appeal had expired. An application for an appeal out of time was filed on behalf of the Petitioner and was granted by the Oklahoma Court of Criminal Appeals on October 5, 1993. On March 18, 1994, the OIDS filed Petitioner's direct appeal brief. The State filed its response brief on May 17, 1994.

## II. ANALYSIS

As a preliminary matter this Court must address whether Petitioner meets the exhaustion requirement of 28 U.S.C. § 2254(b) and (c). Because Petitioner has alleged, among other issues, inordinate delay in the processing of his direct criminal appeal, the Court turns to Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994), to determine whether exhaustion should be excused in this case. In Harris, the Tenth Circuit Court of Appeals held that "the state appellate process should be presumed to be ineffective and, therefore, exhaustion should presumptively be excused, when a petitioner's direct criminal appeal has been pending for two years without resolution absent a constitutionally sufficient justification by the State." Id. at 1556. When a petitioner has been granted an appeal out of time, however, "the length of the appellate process should be measured from the entry of that order unless, of course, delay in perfecting the appeal in the first instance is attributable to the State." Id. at 1556 n.9.

On the basis of the record in this case, the Court concludes that excusing Petitioner's failure to exhaust state remedies is appropriate. Although less than two years have passed since October 5, 1993 (the date of entry of the order granting Petitioner an appeal out of time), "the delay in perfecting the appeal in the first instance is attributable to the State." Id. As noted in the background section of this order, the Oklahoma Indigent Defense System did not receive notice of appointment to represent the Petitioner until July 16, 1993, by which time the time to perfect the appeal had expired. Petitioner is, therefore, excused from exhausting his state remedies. See Taylor v. Hargett, 27 F.3d 483 (10th Cir. 1994).

As the Circuit discussed in Harris, however, "proceeding directly to the merits of a petitioner's claims after excusing exhaustion may not be the preferred course of action, or even an effective one." Id. at 1557. The Court will, therefore, consider whether the delay in adjudicating Petitioner's direct appeal gives rise to an independent due process claim. Id. In determining whether inordinate delay in adjudicating Petitioner's direct criminal appeal violated his substantive due process rights, this Court must balance the following factors:

- a. the length of the delay;
- b. the reason for the delay and whether that reason is justified;
- c. whether the petitioner asserted his right to a timely appeal; and
- d. whether the delay prejudiced the petitioner by

i. causing the petitioner to suffer oppressive incarceration pending appeal; or

ii. causing the petitioner to suffer constitutionally cognizable anxiety and concern awaiting the outcome of his or her appeal; or

iii. impairing the petitioner's grounds for appeal or his or her defense in the event of a reversal and retrial.

Harris, 15 F.3d at 1559. Even though a court is required to balance all four factors, "ordinarily, a petitioner must make some showing on the fourth factor--prejudice--to establish a due process violation." Id.

Delay as a result of the representation by OIDS is insufficient in and of itself to establish prejudice. The Tenth Circuit Court of Appeals has specifically stated that prejudice cannot be presumed from delay alone "absent a delay so excessive as to trigger the Doggett presumption of prejudice." Harris, 15 F.3d 1538, 1565. Although Petitioner has suffered some delay in adjudicating his appeal, the Court does not believe that the delay in this case has been sufficiently long to trigger a presumption of prejudice under Doggett v. United States, 112 S.Ct. 2686 (1992). Cf. Taylor, 27 F.3d at 483, 486 (10th Cir. 1994) (where a two-year and nine-month delay in filing a petitioner's opening brief was insufficient to establish presumed prejudice under Doggett). Accordingly, Petitioner's due process claim as a result of appellate delay must be denied at this time.


Petitioner's ineffective-assistance-of-counsel claim must also fail. In Harris, 15 F.3d at 1569, the Tenth Circuit Court of Appeals held that once counsel files an appellate brief any



ineffectiveness because of delay ends. In addition, as the index from the trial transcript filed in the Court of Appeals indicates, the testimony of Petitioner, Louella Duncan, Randall Duncan, Brenda Flynn, Chuck [Charlie] Stotts was in fact recorded and made part of the record on appeal. Accordingly, any relief based on ineffective assistance of counsel is foreclosed.

Petitioner's application for a writ of habeas corpus is hereby **denied.**

SO ORDERED THIS 19 day of Jan, 1995.

  
THOMAS R. BRETT, Chief Judge  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE JAN 19 1995

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RODNEY C. McCULLOUGH,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 94-C-286-B

**FILED**

JAN 19 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ORDER

At issue before the Court is Petitioner's pro se petition for a writ of habeas pursuant to 28 U.S.C. § 2254. In his petition, Petitioner raises, among other issues, delays associated with prosecuting and deciding his direct criminal appeal before the Oklahoma Court of Criminal Appeals. Respondent has filed a Rule 5 response. For the reasons stated below, the Court concludes that the petition should be denied.

**I. BACKGROUND**

On June 19, 1990, Petitioner was found guilty by a jury of murder in the first degree and sentenced to life imprisonment in Case No. CRF-90-1475, Tulsa County District Court. A petition in error was timely filed on December 31, 1990. Petitioner's counsel filed a direct appeal brief on January 9, 1992, and the State filed its response brief on March 9, 1993. As of the date of this order, no decision has been rendered by the Oklahoma Court of Criminal Appeals.

On March 25, 1994, Petitioner filed the instant petition, alleging inordinate delay in the filing and processing of his

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direct criminal appeal. Petitioner also alleged a claim raised by counsel on direct appeal--i.e., that the evidence of his guilt was insufficient--and a new claim not embodied in his direct appeal--i.e., that the prosecution improperly withheld exculpatory evidence.

In the Rule 5 response, Respondent argues that while there has undoubtedly been a delay in the disposition of Petitioner's direct appeal, Petitioner has failed to show any prejudice which would warrant a finding that a substantive due process violation has occurred. Aside from the due process claim, Respondent contends that Petitioner has submitted a claim not previously raised on appeal and therefore that the petition should be dismissed as a mixed petition.

## **II. ANALYSIS**

As a preliminary matter this Court must address whether Petitioner meets the exhaustion requirement of 28 U.S.C. § 2254(b) and (c). Because Petitioner has alleged, among other issues, inordinate delay in the processing of his direct criminal appeal, the Court turns to Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994), to determine whether exhaustion should be excused in this case. In Harris, the Tenth Circuit Court of Appeals noted that "the state appellate process should be presumed to be ineffective and, therefore, exhaustion should presumptively be excused, when a petitioner's direct criminal appeal has been pending for two years without resolution absent a constitutionally sufficient

justification by the State." Id. at 1556.

The only justification the Respondent offers for the delay in adjudicating Petitioner's appeal is the Court of Appeals ever increasing caseload. Respondent also submits that because Petitioner is represented by the Tulsa County Public Defender's office, a systemic delay in the preparation of direct appeals by the Oklahoma Indigent Defense System is not presented. The Petitioner has not responded to these contentions.

Even if the first nineteen months of delay cannot be considered because Petitioner was represented by the Tulsa County Public Defender's Office instead of the Oklahoma Indigent Defense System, more than two years of unjustified delay have passed without Petitioner's appeal being adjudicated. Under these circumstances, the Court finds that excusing Petitioner's failure to exhaust state remedies is appropriate. See Taylor v. Hargett, 27 F.3d 483 (10th Cir. 1994).

As the Circuit discussed in Harris, however, "proceeding directly to the merits of a petitioner's claims after excusing exhaustion may not be the preferred course of action, or even an effective one." Id. at 1557. The Court will, therefore, dismiss without prejudice Petitioner's non-delay claims and consider whether the delay in adjudicating Petitioner's direct appeal gives rise to an independent due process claim. Id.

In determining whether inordinate delay in adjudicating Petitioner's direct criminal appeal violated his substantive due process rights, this Court must balance the following factors:

- a. the length of the delay;
- b. the reason for the delay and whether that reason is justified;
- c. whether the petitioner asserted his right to a timely appeal; and
- d. whether the delay prejudiced the petitioner by
  - i. causing the petitioner to suffer oppressive incarceration pending appeal; or
  - ii. causing the petitioner to suffer constitutionally cognizable anxiety and concern awaiting the outcome of his or her appeal; or
  - iii. impairing the petitioner's grounds for appeal or his or her defense in the event of a reversal and retrial.

Harris, 15 F.3d at 1559. Even though a court is required to balance all four factors, "ordinarily, a petitioner must make some showing on the fourth factor--prejudice--to establish a due process violation." Id.

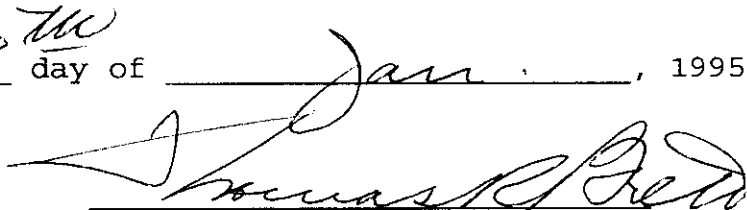
In his reply and "Factual Information" sheet (docs. #9 and #11), Petitioner merely alleges that a delay of more than two years over and above the initial two-year period is sufficient ground in and of itself to reduce his conviction to second degree murder. The Court disagrees. The Tenth Circuit Court of Appeals has specifically stated that prejudice cannot be presumed from delay alone "absent a delay so excessive as to trigger the Doggett presumption of prejudice." Harris, 15 F.3d 1538, 1565. Although Petitioner has suffered substantial delay in adjudicating his appeal, the Court does not believe that the delay in this case has been sufficiently long to trigger a presumption of prejudice under Doggett v. United States, 112 S.Ct. 2686 (1992). Cf. Taylor, 27

F.3d at 483, 486 (10th Cir. 1994) (where a two-year and nine-month delay in filing a petitioner's opening brief was insufficient to establish presumed prejudice under Doggett). Because Petitioner has not established prejudice with particularity, he has failed to establish any prejudice arising from the delay in adjudicating his appeal and the Court must conclude that the delay does not give rise to an independent due process claim.

### III. CONCLUSION

Petitioner's application for a writ of habeas corpus on the basis of appellate delay alone is **denied**, and Petitioner's non-delay claims are hereby **dismissed without prejudice** to Petitioner filing a separate pro se action to pursue any other constitutional claims he might have. See Rule 9 of the Rules Governing Section 2254 Cases in the District Court; McKlesky v. Zant, 499 U.S. 467 (1991).

SO ORDERED THIS 18<sup>th</sup> day of Jan, 1995.



THOMAS R. BRETT, Chief Judge  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET  
DATE                     

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
JAN 19 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

FRED E. MASSINGALE,  
Petitioner,  
vs.  
MICHAEL CODY, et al.,  
Respondent.

No. 93-C-83-B

ORDER

Before the Court is Petitioner's notice of appeal filed on November 25, 1994. Petitioner desires to appeal the decision and order of this Court denying his motion for reconsideration, entered on November 4, 1994. The Petitioner is proceeding in forma pauperis.

28 U.S.C. § 2253 requires a petitioner to obtain a certificate of probable cause before appealing a final order in a habeas corpus proceeding under 28 U.S.C. § 2254. To receive a certificate of probable cause, a petitioner must "make a 'substantial showing of the denial of [a] federal right.'" Lozada v. Deeds, 498 U.S. 430, 431 (1991) (per curiam) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). A petitioner can satisfy this standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Barefoot, 463 U.S. at 893. The Tenth Circuit applies the same standard. See Stevenson v. Thornburgh, 943 F.2d 1214, 1216 (10th Cir. 1991).

After carefully considering the record in this case, the Court

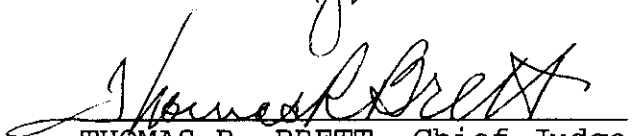
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concludes that a certificate of probable cause should not issue in this case because the Petitioner has not made a substantial showing that he was denied a federal right. The record is devoid of any authority demonstrating that the Tenth Circuit Court of Appeals could resolve the issue differently.

ACCORDINGLY, IT IS HEREBY ORDERED that a certificate of probable cause is **denied**. See Fed. R. App. P. 22(b).

SO ORDERED THIS 18<sup>th</sup> day of Jan, 1995.

  
THOMAS R. BRETT, Chief Judge  
UNITED STATES DISTRICT COURT



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 18 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JERRY LEON ELLIS,  
Plaintiff,

vs.

RONALD J. CHAMPION, et al.,  
Defendants.

No. 94-C-987-BU

DATE 1-19-95

ORDER

On November 2, 1994, the Court denied Plaintiff's motion for leave to proceed in forma pauperis and advised Petitioner that the Court would dismiss the above captioned case unless Plaintiff paid the \$120.00 filing fee within thirty days from the date of entry of the order. The Plaintiff has not paid the filing fee.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's complaint is dismissed without prejudice for failure to pay the filing fee. See Local Rule 5.1(F).

SO ORDERED THIS 18 day of January, 1995.

Michael Burrage  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

FILED

JAN 18 1995

## United States District Court

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

NORTHERN

DISTRICT OF

OKLAHOMA

AARON BURROWS,

Plaintiff,

V.

THE CITY OF TULSA, OKLAHOMA and  
P.W. CALHOUN,

Defendants.

JUDGMENT IN A CIVIL CASE  
ENTERED ON DOCKET

DATE JAN 19 1995

CASE NUMBER: 91-C-950-B

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict. / on 1-18-95

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

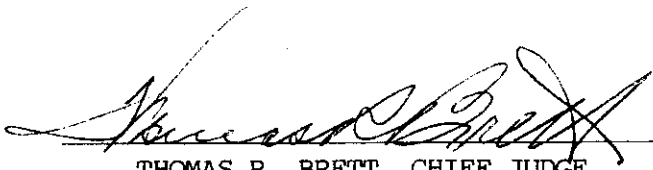
IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of the Defendants  
City of Tulsa, Oklahoma and P. W. Calhoun and against the Plaintiff, Aaron Burrows.

IT IS FURTHER ORDERED that costs are assessed against the Plaintiff, if timely  
application is filed pursuant to Local Rule 54.1(A).

IT IS FURTHER ORDERED that each party shall pay their own respective attorney  
fees.

1-18-95

Date

  
THOMAS R. BRETT, CHIEF JUDGE  
U.S. DISTRICT COURT

(By) Deputy Clerk

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Richard P. Nally, Clerk  
U.S. DISTRICT COURT


IN RE: )  
5000 SKELLY CORPORATION, )  
Debtor. ) CASE NO. 90-2657-C  
(Chapter 7)  
FIGGIE ACCEPTANCE CORPORATION, )  
Appellant, ) Adversary Proceeding  
No. 91-332-C  
vs. ) ENTERED ON DOCKET  
DATE JAN 19 1995  
ABATEMENT SYSTEMS, INC., )  
Appellee. ) District Court  
Case No. 92-C-1100-B

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties to the above entitled action, and hereby stipulate and agree, pursuant to Federal Rule of Appellate Procedure 42(b), that this action should be and hereby is dismissed, together with any and all claims, counterclaims or other causes of action, which have been asserted in this action, or which are capable of assertion in some future action, with prejudice to the right of refiling the same, for the reason and upon the grounds that the parties hereto have finally settled and resolved all claims and matters between them. Each party shall bear his or its own costs of this action and attorneys' fees.

Respectfully submitted,

NICHOLS, WOLFE, STAMPER, NALLY  
FALLIS & ROBERTSON, INC.

  
Thomas P. Nally, OBA No. 6575  
400 Old City Hall Building  
124 East Fourth Street  
Tulsa, Oklahoma 74103-5010  
(918) 584-5182

ATTORNEYS FOR APPELLANT  
FIGGIE ACCEPTANCE CORPORATION

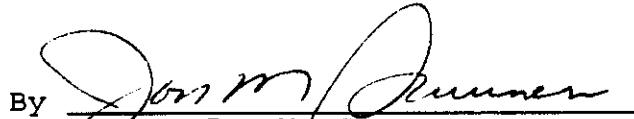
DOERNER, STUART, SAUNDERS,  
DANIEL & ANDERSON



Lewis N. Carter  
320 South Boston, Suite 500  
Tulsa, Oklahoma 74103  
(918) 582-1211

ATTORNEYS FOR APPELLEE  
ABATEMENT SYSTEMS, INC.

ABATEMENT SYSTEMS, INC.



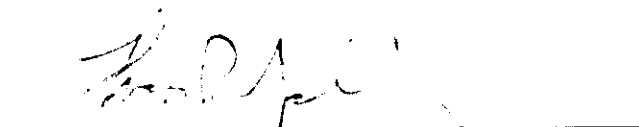
(Name) Jon M. Summers  
(Title) President

CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of January, 1995,  
a true and correct copy of the above and foregoing was mailed postage  
prepaid, to:

Katherine Vance, Esq.  
Assistant U.S. Trustee  
111 W. 5th St., Suite 900  
Tulsa, OK 74103-4263

Melinda J. Martin, Esq.  
MARTIN & SHELTON, P.C.  
320 S. Boston Ave., Suite 905  
Tulsa, OK 74103

  
Thomas P. Nally

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARION PARKER,

Plaintiff,

vs.

BANCOKLAHOMA MORTG. CO.;  
HARRY MORTG. CO.; BRUMBAUGH &  
FULTON; COMMONWEALTH MORTG.  
CO.; FIRST MORTG. CO.; NORWEST  
MORTG. CO.; BOATMEN'S FIRST  
NATIONAL BANK OF OKLAHOMA;  
MORTGAGE CLEARING CORP.; and  
DEPT. OF HOUSING AND URBAN  
DEVELOPMENT,

Defendants.

Case No. 92-C-664-B

ENTERED ON DOCKET

DATE JAN 19 1995

**FILED**

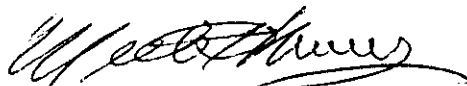
JAN 18 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

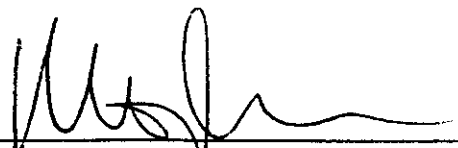
**STIPULATION OF DISMISSAL WITH PREJUDICE**

COMES NOW the Plaintiff Marion Parker, and the Defendants BancOklahoma Mortgage Corp., Harry Mortgage Co., Brumbaugh & Fulton Co., Boatmen's First National Bank of Oklahoma, Mortgage Clearing Corp., and Bank United of Texas, FSB, and file a stipulation of dismissal with prejudice, pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure. The Court shall retain jurisdiction over Marion Parker, BancOklahoma Mortgage Corp., Boatmen's First National Bank of Oklahoma and Mortgage Clearing Corp. to supervise the settlement until December 31, 1995.

Respectfully submitted,



Michael Braswell, OBA #1082  
Braswell & Associates, Inc.  
3621 North Kelly, Suite 100  
Oklahoma City, OK 74111  
Attorney for Plaintiff Marion Parker



---

C. S. Lewis, III, OBA #5402  
Marilyn M. Wagner, OBA #6292  
Riggs, Abney, Neal, Turpen,  
Orbison & Lewis  
502 West Sixth  
Tulsa, Oklahoma 74119  
Attorneys for Defendant  
BancOklahoma Mortgage Corp.



Larry D. Henry, OBA #4105

Pat Cipolla, OBA #15203

Huffman, Arrington, Kihle,

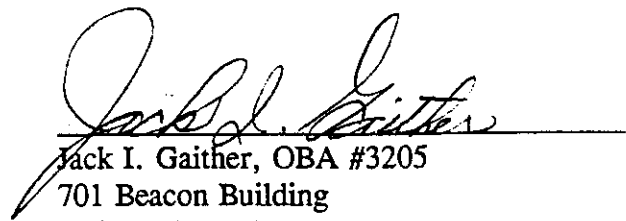
Gaberino & Dunn

1000 ONEOK Plaza, 100 W. 5th St.

Tulsa, OK 74103

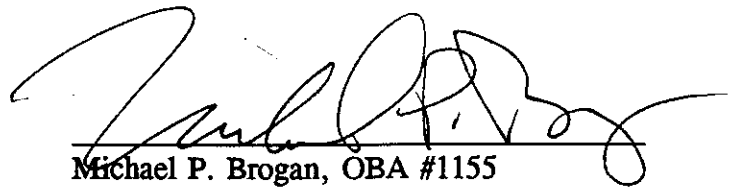
Attorneys for Defendant

Boatmen's First National Bank of Oklahoma



Jack I. Gaither, OBA #3205  
701 Beacon Building  
406 South Boulder  
Tulsa, OK 74103-3825  
Attorneys for Defendant  
Mortgage Clearing Corp.




A handwritten signature in black ink, appearing to read 'Michael P. Brogan', is written over a horizontal line.

Michael P. Brogan, OBA #1155  
Brogan & Brogan  
2809 N.W. Expressway, Suite 380  
Oklahoma City, OK 73112  
Attorneys for Defendant  
Harry Mortgage Co.

*Ronald Main*

---

Ronald Main, OBA #5634  
P. O. Box 521150  
Tulsa, OK 74152-1150  
Attorneys for Defendant  
Brumbaugh & Fulton, Co.

  
A. Martin Wickliff, Jr., ID #3466  
Devon Vrana, ID #  
Wickliff & Hall  
1st Interstate Bank Plaza  
1000 Louisiana Street, Suite 5400  
Houston, TX 77002  
Attorneys for Defendant  
Bank United Of Texas, FSB

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of January, 1995, a true and correct copy of the above and foregoing document was mailed, with full and sufficient postage affixed thereon, to:

Michael T. Braswell, Esq.  
Braswell & Adjei  
3621 North Kelly, Suite 100  
Oklahoma City, OK 74111


Jack I. Gaither, Esq.  
701 Beacon Building  
406 South Boulder  
Tulsa, OK 74103-3825

Mike Brogan, Esq.  
Brogan & Brogan  
2809 N.W. Expressway, Suite 380  
Oklahoma City, OK 73112

Larry D. Henry, Esq.  
Huffman, Arrington, Kihle,  
Gaberino & Dunn  
1000 ONEOK Plaza, 100 W. 5th St.  
Tulsa, OK 74103

Ronald Main, Esq.  
P. O. Box 521150  
Tulsa, OK 74152-1150

A. Martin Wickliff, Jr., Esq.  
Wickliff & Hall  
1st Interstate Bank Plaza  
1000 Louisiana Street, Suite 5400  
Houston, TX 77002

  
\_\_\_\_\_  
Marilyn M. Wagner

**FILED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

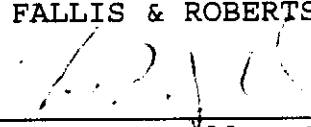
JAN 18 1995

IN RE:	)	Richard M. Lawrence, Clerk
	)	U.S. DISTRICT COURT
5000 SKELLY CORPORATION,	)	
	)	CASE NO. 90-02657-C
Debtor.	)	(Chapter 7)
	)	
FIGGIE ACCEPTANCE CORPORATION,	)	
	)	Adversary Proceeding
Appellant,	)	No. 91-0332-C
	)	ENTERED ON DOCKET
vs.	)	
	)	DATE JAN 19 1995
ABATEMENT SYSTEMS, INC.,	)	
	)	District Court
Appellee.	)	Case No. 92-C-540-B

**STIPULATION OF DISMISSAL WITH PREJUDICE**

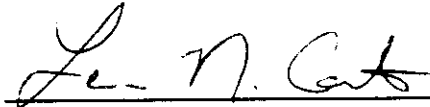
COME NOW the parties to the above entitled action, and hereby stipulate and agree, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), that this action should be and hereby is dismissed, together with any and all claims, counterclaims or other causes of action, which have been asserted in this action, or which are capable of assertion in some future action, with prejudice to the right of refiling the same, for the reason and upon the grounds that the parties hereto have finally settled and resolved all claims and matters between them. Each party shall bear his or its own costs of this action and attorneys' fees.

NICHOLS, WOLFE, STAMPER, NALLY,  
FALLIS & ROBERTSON, INC.

  
\_\_\_\_\_  
Thomas P. Nally, OBA No. 6575  
400 Old City Hall Building  
124 East Fourth Street  
Tulsa, Oklahoma 74103-5010  
(918) 584-5182

ATTORNEYS FOR APPELLANT  
FIGGIE ACCEPTANCE CORPORATION

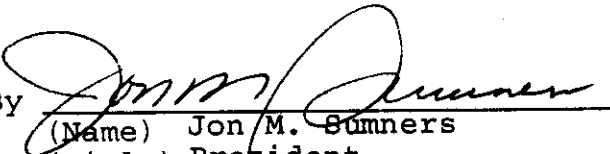
DOERNER, STUART, SAUNDERS,  
DANIEL & ANDERSON



Lewis N. Carter  
320 South Boston, Suite 500  
Tulsa, Oklahoma 74103  
(918) 582-1211

ATTORNEYS FOR APPELLEE  
ABATEMENT SYSTEMS, INC.

ABATEMENT SYSTEMS, INC.

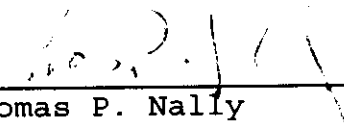
By   
(Name) Jon M. Summers  
(Title) President

**CERTIFICATE OF MAILING**

I hereby certify that on the 18<sup>th</sup> day of January, 1995,  
I mailed a true and correct copy of the above and foregoing  
Stipulation of Dismissal with Prejudice, with proper postage fully  
prepaid thereon, to:

Katherine Vance, Esq.  
Assistant U.S. Trustee  
111 W. Fifth St., Suite 900  
Tulsa, OK 74103

Melinda J. Martin, Esq.  
MARTIN & SHELTON, P.C.  
320 S. Boston Ave., Suite 905  
Tulsa, OK 74103

  
Thomas P. Nally

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 19 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

HEATHER DAWN HALL,  
Plaintiff,

vs.

TANKINETICS, INC.

Defendant.

Case No. 94-C-326-K

ENTERED ON DOCKET

JAN 19 1995  
DATE

STIPULATION OF DISMISSAL

COME NOW the parties, Heather Dawn Hall, Plaintiff, and Tankinetics, Inc., Defendant, and pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, hereby file this Stipulation of Dismissal. The parties agree that all causes of action asserted in this lawsuit on behalf of the plaintiff against the defendant are dismissed. The parties have agreed that each party will be responsible for its own costs and attorneys fees incurred in the above captioned lawsuit.

This Stipulation of Dismissal is signed by counsel for the parties who have appeared in this action after the parties have been fully informed of the effects of such dismissal.

Heather Dawn Hall  
Heather Dawn Hall

Chris Ellen Rogers  
Chris Ellen Rogers, OBA #014385  
Dan A. Rogers, OBA #7717  
4920 South Lewis, Suite 102  
Tulsa, Oklahoma 74105-5170  
(918) 742-0606  
ATTORNEYS FOR PLAINTIFF

Robert L. Huckaby  
Robert L. Huckaby, OBA #4429  
Barry G. Burkhart, OBA #14092  
HUCKABY, FLEMING, FRAILEY, CHAFFIN,  
CORDELL, GREENWOOD & PERRYMAN  
P. O. Box 533  
Chickasha, Oklahoma 73023  
(405) 224-0237  
FAX (405) 222-2319  
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF MAILING

I hereby certify that on the 16<sup>th</sup> day of January, 1995, I mailed a true and correct copy of the above and foregoing instrument to the following attorney of record:

Chris Ellen Rogers  
Dan A. Rogers  
4920 South Lewis, Suite 102  
Tulsa, Oklahoma 74105-5170

  
\_\_\_\_\_  
Robert L. Huckaby



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 18 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

RADCO, INC.

Plaintiff,

vs.

Case No. 92-C-1034-E

MAYHAN FABRICATORS, INC.

Defendant,

and

LITWIN ENGINEERS &  
CONSTRUCTORS, INC.

Plaintiff in Intervention

vs.

GLASS DESIGN, INC., an Oklahoma  
corporation, and CALLIDUS  
TECHNOLOGIES, INC.,

Defendants in Intervention.

ENTERED ON DOCKET  
JAN 18 1995  
DATE

**ORDER AND JUDGMENT**

This cause came on for hearing January 6, 1995, upon the pending Motion for Summary Judgment by Callidus Technologies, Inc. ("Callidus") against Radco, Inc. ("Radco") and upon the oral motion for judgment by Callidus against Radco. Callidus appeared by its attorney Kari S. McKee. Radco appeared by its attorney Larry D. Leonard. Litwin Engineers and Constructors, Inc. appeared by its attorney John H. Tucker.

Having heard the arguments of counsel and examined the matters and evidence presented in the court file and the parties' briefs, the Court finds: (1) this Court has subject matter

159

WMS Radco  
P.L.C.

jurisdiction over Callidus' claim against Radco; (2) this Court has personal jurisdiction over Radco with regard to Callidus' claim against Radco; (3) there is no dispute as to any material fact regarding Callidus' claim against Radco and the facts alleged by Callidus in its claim against Radco are true and correct; and (4) judgment in favor of Callidus against Radco, as requested, is warranted and proper.

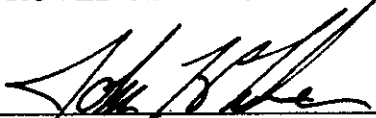
Accordingly, the Court hereby ORDERS, ADJUDGES AND DECREES that Callidus, Inc., is granted judgment against Radco, Inc. in the amount of \$43,615.00, plus interest, costs and attorneys fees, less \$25,121.76 (the amount distributed by the Clerk of this Court to Callidus from the funds interplead by Litwin Engineers and Constructors, Inc.).

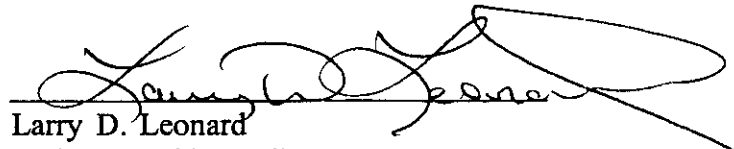
IT IS FURTHER ORDERED that Radco shall have ten days from the date of the hearing, or until January 16, 1995, to file an Application for Leave to Assert a Cross-Claim against Litwin Engineers and Constructors, Inc. Litwin shall have ten days from and after the filing of that Application to respond.

DATED this 17<sup>th</sup> day of January, 1995.

  
UNITED STATES DISTRICT JUDGE


APPROVED AND AGREED:

  
John H. Tucker  
Rhodes, Hieronymus, Jones  
Tucker & Gable  
P.O. Box 21100  
Tulsa, Oklahoma 74121-1100  
ATTORNEYS FOR LITWIN ENGINEERS & CONSTRUCTORS, INC.



---

Larry D. Leonard  
Zarbano, Bridger-Riley,  
Leonard and Scott-Page  
5051 South Lewis  
Suite 200  
Tulsa, Oklahoma 74105  
ATTORNEYS FOR RADCO, INC.



---

John Henry Rule  
Kari S. McKee  
Gable & Gotwals, Inc.  
15 West Sixth Street  
2000 Bank IV Center  
Tulsa, Oklahoma 74119-5447  
ATTORNEYS FOR CALLIDUS TECHNOLOGIES, INC.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
JAN 18 1995  
DATE

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIS J. WALKER; ANNIE WALKER;  
LOCAL AMERICA BANK OF TULSA  
successor by merger to  
MIDAMERICA FEDERAL SAVINGS & LOAN  
ASSOCIATION; COUNTY TREASURER,  
Tulsa County, Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants. ) CIVIL ACTION NO. 94-C 185E

**FILED**

JAN 18 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of January, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 24, 1994, pursuant to an Order of Sale dated August 23, 1994, of the following described property located in Tulsa County, Oklahoma:

Lot Eight (8), Block Six (6), NORTHGATE SECOND ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof;

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Willis J. Walker through his Attorney H.W. Conyers, Local America Bank of Tulsa successor by merger to Midamerica Federal Savings and Loan through its General Counsel Alan L. Pollock, and to County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through

DO NOT WRITE IN THESE SPACES  
PROCEEDINGS TO BE FILED  
UPON RECEIPT

Assistant District Attorney Dick A. Blakeley, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be

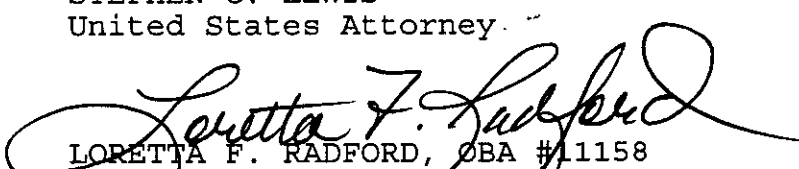
granted possession of the property against any or all persons  
now in possession.

S/JEFFREY S. WOLFE  
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney.

  
LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 94-C 185E

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
JAN 18 1995  
DATE

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

FRANK LEE WYRICK; SHARON KAY  
WYRICK; WELLS FARGO CREDIT  
CORPORATION; COUNTY TREASURER,  
Tulsa County, Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants. ) CIVIL ACTION NO. 94-C 213E

**FILED**

JAN 18 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of January, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on December 6, 1994, pursuant to an Order of Sale dated September 29, 1994, of the following described property located in Tulsa County, Oklahoma:

Lot Seven (7), Block Seven (7), LAYMAN ACRES,  
an Addition in Tulsa County, State of  
Oklahoma, according to the Recorded Plat  
thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Wells Fargo Credit Corporation through its Attorney Kenneth G. Miles, and to County Treasurer and Board of County Commissioners through Assistant District Attorney Dick A. Blakeley, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

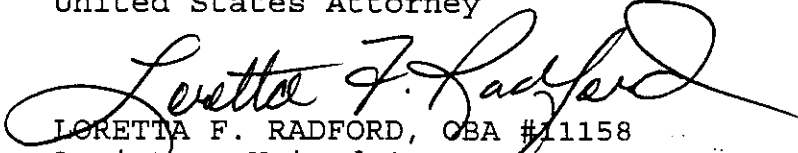
S/ JEFFREY S. WOLFE  
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE



APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in cursive script, reading "Loretta F. Radford". The signature is written in dark ink and is positioned above the typed name and title of the signatory.

LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 94-C 213E

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DELORES J. PATTON; CITY OF  
GLENPOOL, Oklahoma; COUNTY  
TREASURER, Tulsa County;  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants. ) CIVIL ACTION NO. 94-C 315E

JAN 18 1995  
**FILED**

JAN 18 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of January, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 24, 1994, pursuant to an Order of Sale dated September 1, 1994, of the following described property located in Tulsa County, Oklahoma:

Lot Twelve (12), Block Four (4), GLENN RIDGE,  
an Addition to the City of Glenpool, Tulsa  
County, Oklahoma, according to the recorded  
plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, City of Glenpool through its Mayor Don Bahmaier and to County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Assistant District Attorney Dick A. Blakeley, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

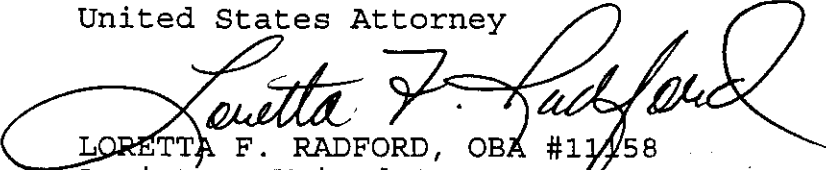
S/JEFFREY S. WOLFE  
U.S. MAGISTRATE JUDGE

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UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 94-C 315E

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN W. RUTHERFORD; CARMEN L.  
RUTHERFORD; JOHN E. MAEHR;  
MARY MAEHR; STATE OF OKLAHOMA,  
ex rel. OKLAHOMA TAX COMMISSION;  
HILLCREST MEDICAL CENTER;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants. ) CIVIL ACTION NO. 94-C 420E

JAN 18 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JAN 18 1995

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 18th day of January, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 31, 1994, pursuant to an Order of Sale dated September 7, 1994, of the following described property located in Tulsa County, Oklahoma:

LOT THIRTY-THREE (33), BLOCK ONE (1), SANS  
SOUCI ADDITION TO THE CITY OF TULSA, TULSA  
COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE  
RECORDED PLAT THEREOF.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, John W. Rutherford, Carmen L. Rutherford, John E. Maehr, Mary Maehr, State of Oklahoma ex rel Oklahoma Tax Commission through its Assistant General Counsel Kim D. Ashley,

Hillcrest Medical Center through its Attorney Daniel M. Webb, and to County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed

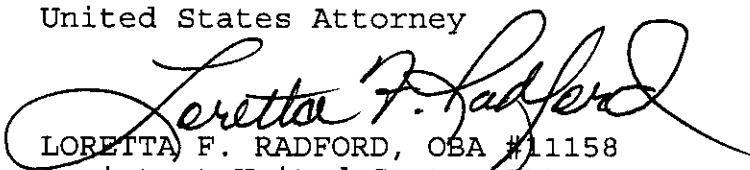
to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE  
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

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Report and Recommendation of United States Magistrate Judge  
Civil Action No. 94-C 420E

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED IN DOCKET  
JAN 18 1995

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

JACK D. SCRAPER; BETTY SUE )  
SCRAPER; COUNTY TREASURER, Tulsa )  
County, Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma, )

Defendants. ) CIVIL ACTION NO. 94-C 551E

**FILED**

JAN 18 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of January, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on October 24, 1995, pursuant to an Order of Sale dated August 23, 1994, of the following described property located in Tulsa County, Oklahoma:

Lot Six (6), Block Twenty-two (22), of Blocks  
19 thru 25, WAGON WHEEL ADDITION, a  
Subdivision in Tulsa County, State of  
Oklahoma, according to the recorded Plat  
thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Jack D. Scrapper, Betty Sue Scrapper, and to County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Assistant District Attorney Dick A. Blakeley, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.



The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

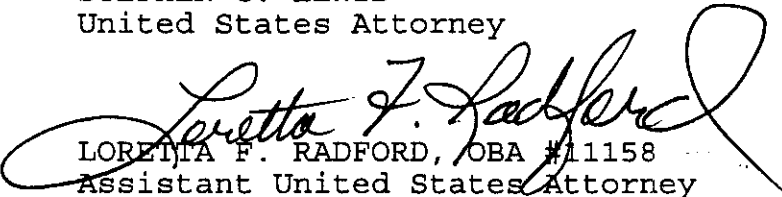
S/JEFFREY S. WOLFE  
U.S. MAGISTRATE JUDGE

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UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 94-C 551E

ENTERED BY \_\_\_\_\_  
DATE JUN 10 1995

**FILED**

SEP 18 1995

**Richard M. Lawrence, Clerk**  
**U.S. DISTRICT COURT**

Notice of

ATTORNEYS FOR PLAINTIFF

**CERTIFICATE OF MAILING**

I, the undersigned, do hereby certify that on the 18<sup>th</sup> day of January, 1995, a true and correct copy of the above and foregoing instrument was mailed, postage prepaid, to the following counsel of record:

Carl D. Hall, Jr., Esq.  
S.M. Fallis, Jr., Esq.  
Nichols, Wolfe, Stamper, Nally,  
Fallis & Robertson, Inc.  
Suite 400 Old City Hall  
124 E. 4th St.  
Tulsa, OK 74103-5010

  
\_\_\_\_\_  
Richard P. Poormon

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

ROBERT A. SHOWLER; TAMMY N.  
SHOWLER; CITY OF BROKEN ARROW,  
Oklahoma; COUNTY TREASURER,  
Tulsa County, Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

**FILED**

JAN 18 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 1-18-95

CIVIL ACTION NO. 94-C 538B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18<sup>th</sup> day  
of Jan., 1995. The Plaintiff appears by Stephen C.  
Lewis, United States Attorney for the Northern District of  
Oklahoma, through Neal B. Kirkpatrick, Assistant United States  
Attorney; the Defendants, **County Treasurer, Tulsa County,**  
**Oklahoma,** and **Board of County Commissioners, Tulsa County,**  
**Oklahoma,** appear by Dick A. Blakeley, Assistant District  
Attorney, Tulsa County, Oklahoma; the Defendant, **City of Broken**  
**Arrow, Oklahoma,** appears by Michael R. Vanderburg, City Attorney;  
and the Defendants, **Robert A. Showler and Tammy N. Showler,**  
appear not, but make default.

The Court being fully advised and having examined the  
court file finds that the Defendant, **Robert A. Showler,** waived  
service of Summons on June 16, 1994, which was filed on June 17,  
1994; and that the Defendant, **City of Broken Arrow, Oklahoma,**  
acknowledged receipt of Summons and Complaint via Certified Mail  
on May 26, 1994.

The Court further finds that the Defendant, **Tammy N. Showler**, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 13, 1994, and continuing through November 17, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, **Tammy N. Showler**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, **Tammy N. Showler**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her

present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on June 9, 1994; that the Defendant, **City of Broken Arrow, Oklahoma**, filed its Answer on June 3, 1994; and that the Defendants, **Robert A. Showler and Tammy N. Showler**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Four(4), Block Nine (9), ARROW SPRINGS PARK, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on February 17, 1983, James T. Joyce and Janice A. Joyce, executed and delivered to LIBERTY MORTGAGE COMPANY their mortgage note in the amount of \$56,600.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, James T. Joyce and Janice A.

Joyce, husband and wife, executed and delivered to LIBERTY MORTGAGE COMPANY a mortgage dated February 17, 1983, covering the above-described property. Said mortgage was recorded on February 25, 1983, in Book 4671, Page 1041, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 31, 1986, Liberty Mortgage Company assigned the above-described mortgage note and mortgage to GMAC MORTGAGE CORPORATION OF IOWA. This Assignment of Mortgage was recorded on April 4, 1986, in Book 4933, Page 3174, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 11, 1990, GMAC Mortgage Corporation of Iowa assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, DC., his successors and assigns. This Assignment of Mortgage was recorded on December 17, 1990, in Book 5294, Page 791, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Robert A. Showler and Tammy N. Showler, currently hold the record title to the property by virtue of a General Warranty Deed dated August 14, 1989, and recorded on August 18, 1989 in Book 5201, Page 2524, in the record of Tulsa County, Oklahoma. The Defendants, Robert A. Showler and Tammy N. Showler, are the current assumptors of the subject indebtedness.

The Court further finds that on July 1, 1990, the Defendants, Robert A. Showler and Tammy N. Showler, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the



Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on August 1, 1991, February 1, 1992, and October 1, 1992.

The Court further finds that the Defendants, **Robert A. Showler and Tammy N. Showler**, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Robert A. Showler and Tammy N. Showler**, are indebted to the Plaintiff in the principal sum of \$75,310.82, plus interest at the rate of 12 percent per annum from May 16, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$41.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title, or interest in the subject real property except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, **Robert A. Showler and Tammy N. Showler**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Robert A. Showler and Tammy N. Showler**, in the principal sum of \$75,310.82, plus interest at the rate of 12 percent per annum from May 16, 1994 until judgment, plus interest thereafter at the current legal rate of 7.22 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$41.00 for personal property taxes for the year 1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title or interest in the subject real property, except insofar as it is

the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Robert A. Showler, Tammy N. Showler and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Robert A. Showler and Tammy N. Showler, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

**Third:**

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$41.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

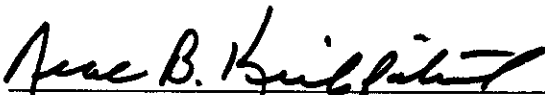
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.


**S/ THOMAS R. BRETT**


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

  
NEAL B. KIRKPATRICK  
Assistant United States Attorney  
3900 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

  
DICK A. BLAKELEY, OBA #852  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
(918) 596-4841  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County, Oklahoma

  
MICHAEL R. VANDERBURG, OBA#9180  
City Attorney  
P.O. Box 610  
Broken Arrow, Oklahoma 74012  
(918) 251-5311  
Attorney for Defendant,  
City of Broken Arrow, Oklahoma

Judgment of Foreclosure  
Civil Action No. 94-C 538B

NBK:lg

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 17 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

GEO-GRAPHICS, INC.,

Plaintiff,

vs.

GLOBAL GRAPHICS, INC., et al

Defendants.

Case No. 93-C-116-B ✓

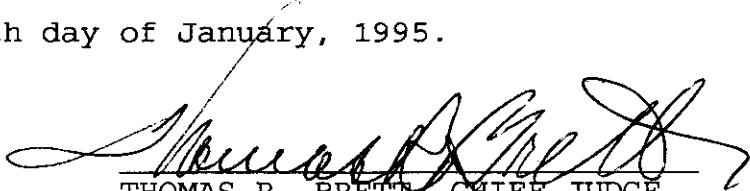
**JUDGMENT DISMISSING ACTION**  
**BY REASON OF SETTLEMENT**

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

**IT IS ORDERED** that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

**IT IS FURTHER ORDERED** that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

**IT IS SO ORDERED** this 17th day of January, 1995.

  
THOMAS R. BRETT, CHIEF JUDGE  
UNITED STATES DISTRICT

ENTERED ON DOCKET

DATE 1-18-95

Figure 1 consists of five subplots, each representing a different pH level: 5.5, 6.0, 6.5, 7.0, and 7.5. Each subplot shows the growth of *E. coli* O157:H7 in ground beef over a period of 100 hours. The y-axis for all plots is 'Log CFU/g' ranging from 0 to 10. The x-axis is 'Time (h)' ranging from 0 to 100. Each plot contains three data series representing different temperatures: 4°C (open circles), 10°C (open squares), and 20°C (open triangles). In all cases, growth increases over time, with higher temperatures leading to faster growth. The growth is most rapid at pH 7.5 and least rapid at pH 5.5.

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[illegible]

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JAN 18 1995

**ORDER**

urt for a decision is Petitioner's  
deas corpus pursuant to 28 U.S.C. §  
llenges the revocation of his parole  
pondent has filed a response and a  
h Petitioner has replied. As more  
concludes that Petitioner's petition  
ould be denied.

## I. BACKGROUND

On April 5, 1983, petitioner pleaded guilty to the charge of robbery with firearms, after former conviction of a felony, in the District Court of Tulsa County, Case No. CRF-82-4539. On May 25, 1983, the district court sentenced Petitioner to nineteen years imprisonment. Petitioner did not perfect a direct appeal and on June 1, 1983, he was received in the Oklahoma Department of Corrections to begin serving his sentence. On October 26, 1987, Petitioner was paroled and pursuant to the Uniform Act for Out-of-state Parolee Supervision, found at Okla. Stat. tit. 57, § 347 et seq., was sent to the State of Kansas to serve his parole. (August

22, 1989 Interstate Investigation Request, part of ex. A attached to Respondent's Supplemental Response doc. #25.)

While in Kansas, Petitioner tested positive for cocaine and marijuana use and was referred to drug treatment on September 12, 1988. (February 7, 1990 Case Report, part of ex. A attached to Respondent's Supplemental Response doc. #25.) A special condition that he complete the drug program and attend the "AA/NA twice a week" was later added to his parole. (Id.) However, on March 7 and May 26, 1989, Petitioner again tested positive for cocaine. Kansas authorities recommended to Oklahoma authorities that the Petitioner undergo in-patient counseling and advised Petitioner that another positive drug test would cause his case to be transferred back to Oklahoma. (Id.)

On July 10, 1989, Kansas authorities instructed Petitioner to return to Oklahoma because of his continued cocaine use. On September 22, 1989, an agreement was reached whereby supervision of Petitioner's case would be transferred to Oklahoma City until Kansas would again accept supervision over the Petitioner. On September 26, 1989, however, Kansas authorities notified Officer Wedgeworth, in Oklahoma City, that they would not accept supervision of Petitioner until he had completed long term in-patient drug treatment. (Id.)

Thereafter Officer Wedgeworth permitted Petitioner to return to Kansas for thirty days to take care of personal business. Although Petitioner returned to Oklahoma as instructed, he failed to report to his parole officer during the subsequent months.



(Id.) On December 7, 1989, Officer Wedgeworth contacted the Petitioner's sister and learned that the Petitioner had returned to Kansas with his brother on December 3, 1989. On January 22, 1990, the Petitioner contacted Officer Wedgeworth by phone and informed her that he planned to stay in Kansas. Wedgeworth informed the Petitioner at that time that he was in violation of his parole for leaving the State of Oklahoma without permission and for changing his address without first notifying her. On February 7, 1990, Officer Wedgeworth prepared a violation report and requested that a warrant be issued for Petitioner's arrest.<sup>1</sup> The warrant was issued on March 3, 1990. (Id.)

On October 26, 1990, Petitioner was arrested by the Wichita State University Police Department on the basis of the Oklahoma warrant and detained at the Sedgwick County Jail. (November 26, 1990 Case Report, part of ex. A attached to Respondent's Supplemental Response, doc. #25.) Petitioner waived extradition and on November 21, 1990, he was transported by an Oklahoma Officer to the Oklahoma County Jail where he was served with Notice of Probable Cause Hearing and Executive Revocation Hearing. (Id.) Petitioner signed a waiver of probable cause hearing, but reserved his right to an executive revocation hearing which was held four months later on March 21, 1991, at Oklahoma State Penitentiary. (Id.; Notice of Probable Cause Hearing and Executive Revocation

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<sup>1</sup>Petitioner was cited for the following violations: (a) failing to report to parole officer; (b) failing to report his change of address; (c) leaving the state without permission; and (d) failing to submit parole fees of \$10.00 since November of 1987.

Hearing, part of ex. A attached to Respondent's Supplemental Response doc. #25.) A summary of the revocation proceeding, recommending revocation of Petitioner's parole, was forwarded to Governor David Walters on April 19, 1991. The Governor signed the certificate of parole revocation and denied any credit for street time on June 10, 1991.

Petitioner immediately filed an application for post-conviction relief, alleging among other issues that the revocation hearing was not conducted within a reasonable time. On May 1, 1992, the district court found that the four-month delay between the time Petitioner waived his preliminary hearing and the time of his parole revocation hearing was reasonable. In the alternative, the district court concluded that Petitioner had failed to indicate any prejudice as a result of the delay and the Court concluded that it could find none. On August 19, 1992, the Court of Criminal Appeals affirmed the district court's denial of post-conviction relief and found that Petitioner's waiver of a preliminary hearing upon his return to Oklahoma amounted to the relinquishment of his "right to subsequently complain of any failure to allow him a preliminary inquiry" in Kansas.

Next Petitioner filed a "motion to submit and consolidate" in the Court of Criminal Appeals. He sought to add to his appeal a claim that Okla. Stat. tit. 57, section 516 (enacted in 1987) was an ex post facto law that could not be used to prohibit him from accruing earned credits during the period he was re-incarcerated. On September 2, 1992, the Court of Appeals held that Petitioner's

amended claim was not properly before the Court because it had not been presented to the district court. In the alternative, the Court held that, because Petitioner's parole violation and reincarceration occurred well after the 1987 amendment, section 516 was not an ex post facto law as applied to the Petitioner.

In October 1992, Petitioner filed the present petition for a writ of habeas corpus.<sup>2</sup> He restated (1) that section 516 was an ex post facto law as applied to him and greatly prejudiced his case; (2) that no preliminary hearing was conducted in Wichita, Kansas (the place of arrest) on October 26, 1990, although he remained in the county jail there for twenty-eight days; and (3) that his revocation hearing was not conducted within a reasonable time.

## II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112

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<sup>2</sup>On October 15, 1992, the Court ordered Petitioner to resubmit his petition on the proper court-authorized form. [Docket #2.] Petitioner's amended petition on the court-authorized form was ultimately filed on December 14, 1992. [Docket #4.]

S. Ct. 1715 (1992).

**A. Ex Post Facto Law**

Even if Petitioner's first ground for relief were not procedurally barred, the Court concludes that Petitioner would not be entitled to relief. Prior to November 1, 1987, parolees who were awaiting a decision by the Governor on their parole revocation were incarcerated in a county jail and were allowed to earn credits. Okla. Stat. tit. 57, § 516 (1986 Supp.). In 1987, the Oklahoma Legislature amended section 516 to provide that a parolee after arrest shall be incarcerated in the nearest county jail as well as a facility of the Department of Corrections to await action of the Governor. Okla. Stat. tit. 57, § 516 (1987 Supp.). Section 516 was also amended to provide that "earned credits shall not be accrued during the period of time that the parolee is incarcerated pending action by the Governor."

Petitioner argues that the 1987 amendments to section 516 are an ex post facto law as applied to him. He alleges that the amendments to section 516 should not have been used to prohibit him from accruing earned credits from October 26, 1990, until June 10, 1991, (the period he was re-incarcerated as a result of his parole violation) because he was initially convicted in 1983 prior to the effective date of those amendments. The Court disagrees.

Because the 1987 amendments to section 516 do not affect acts which occurred before they came into force, that section is not an ex post facto law as applied to Petitioner. Devine v. New Mexico

Dept. of Corrections, 866 F.2d 339, 341 (10th Cir. 1989) (for a statute to be ex post facto, it must be applied retrospectively and it must disadvantage the offender affected by it). Petitioner's parole violation and the resulting incarceration for which he seeks earned credits occurred in 1989 and 1990, well after the legislature enacted the 1987 amendments to section 516. The fact that Petitioner was initially convicted in 1983 is irrelevant to the time he violated his parole.

Accordingly, Petitioner is not entitled to habeas relief on his first ground of error.

#### **B. Preliminary/Probable Cause Hearing**

In his second ground for relief, Petitioner argues that a preliminary hearing was not conducted in Kansas pursuant to the Out-of-state Parolee Supervision Act, Okla. Stat. tit. 57, § 349.1.<sup>3</sup> Respondent submits that the provisions of the Out-of-state

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<sup>3</sup>Section 349.1 provides as follows:

"Where supervision of a parolee . . . is being administered pursuant to the Interstate Compact for the Supervision of Parolees and Probationers, appropriate . . . authorities in this state shall notify the Compact Administrator of the sending state whenever, in their view, consideration should be given to retaking or reincarceration for a parole or probation violation. Prior to the giving of any such notification, a hearing shall be held in accordance with this action within a reasonable time, unless such hearing is waived by the parolee. . . . The appropriate officer or officers of this state shall, as soon as practicable following termination of any such hearing, report to the sending state, furnish a copy of the hearing record and make recommendations regarding the disposition to be made of the parolee or probationer by the sending state. . . .

Parolee Supervision Act, including the hearing provision in section 349.1, do not apply to the Petitioner because, at the time of the parole violation and arrest, Petitioner was no longer an out-of-state parolee under that Act. This Court agrees.

As noted in the background section of this order, Petitioner did not commit the four enumerated parole violations until after September 26, 1989, when the state of Kansas had categorically refused to accept further supervision of Petitioner's case until after he had completed long term in-patient drug treatment. Petitioner was, therefore, under the supervision of Officer Wedgeworth in Oklahoma City at the time of his parole violations. The fact that Officer Wedgeworth permitted Petitioner to return to Kansas for thirty days in September and October 1989, does not support Petitioner's contention that he was in Kansas under the Out-of-state Parolee Supervision Act. Therefore, Petitioner was not entitled to a preliminary hearing in Kansas pursuant to section 349.1 because the Out-of-state Parolee Supervision Act was no longer applicable to him.<sup>4</sup>

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<sup>4</sup>Even if Petitioner had not waived his right to a preliminary probable cause hearing upon arrival in Oklahoma, the Court concludes that Petitioner would not have been entitled to a preliminary probable cause hearing in Kansas under the Due Process Clause of the Fourteenth Amendment. See Morrissey v. Brewer, 408 U.S. 471 (1972). Because obtaining permission before leaving Oklahoma was a condition of his parole, Petitioner's presence in Kansas without such permission was sufficient probable cause to believe that he had committed an act which constituted a violation of his parole. See Barton v. Malley, 626 F.2d 151, 159 (10th Cir. 1980).

### C. Revocation Hearing

In his last ground for relief, Petitioner argues that he was denied due process by the unjustifiable delay in his parole revocation hearing. In Morrissey v. Brewer, 408 U.S. 471, 482 (1972), the United States Supreme Court held that in addition to a preliminary probable cause hearing, minimum due process requires a full revocation hearing before a neutral and detached hearing body for which the parolee has been given written notice of the claim of violations of parole, disclosure of the evidence against him, and an opportunity to be heard in person, to present witnesses, and to confront and cross-examine adverse witnesses. The Court also held that a revocation hearing must be held within a reasonable time after the parolee is taken into custody and found that a two-month delay was not unreasonable. Id. at 488.

In the present case, Petitioner was arrested and taken into custody in Kansas on October 26, 1990. His revocation hearing was not held until over four months later on March 21, 1991. The Court does not find such a delay unreasonable in this case. See Parker v. State, 795 P.2d 68, 70 (Kan. App. 1990) (holding that a delay of three and one-half months was neither unreasonable nor prejudicial).

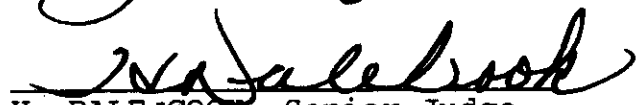
Even if a four-month delay in providing a revocation hearing were unreasonable under Morrissey, habeas corpus relief is available to Petitioner only if he establishes that the delay was also prejudicial. Sutherland v. McCall, 709 F.2d 730, 732 (D. C. Cir. 1983); Carolton v. Keohane, 691 F.2d 992, 993 (11th Cir. 1982); Goodman v. Keohane, 663 F.2d 1044, 1046 (11th Cir. 1981), reh.

denied, 668 F.2d 536 (11th Cir. 1982). Petitioner argues that the delay was prejudicial in this case because of his inability to earn good-time credits or day-for-day credits. He also argues that he received misconduct reports during the delay in question and that earned credits were taken away. Respondent contends that inability to earn good-time credits or day-for-day credits during the delay does not constitute a sufficient showing of prejudice to warrant relief. This Court agrees. The state law in effect at the time of Petitioner's parole violation specifically provided that earned credits shall not be accrued during the period of time that a parole violator is incarcerated pending action by the governor. Okla. Stat. tit. 57, § 516 (1987 Supp.).

### III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. Accordingly, Petitioner's application for a writ of habeas corpus is hereby **denied**.

SO ORDERED THIS 17<sup>th</sup> day of January, 1995.

  
H. DALE COOK, Senior Judge  
UNITED STATES DISTRICT COURT



IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 17 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

BARBARA JO HENDRICKS,

Plaintiff,

v.

Case No. 94-C-854-K

HOUSEHOLD RETAIL SERVICES, INC.,

Defendant.

ENTERED & INDEXED  
JAN 17 1995

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff Barbara Jo Hendricks, by and through her attorney of record Sean H. McKee, and Defendant Household Retail Services, Inc. by and through its attorney of record, Lewis N. Carter, hereby stipulate to the Dismissal with Prejudice of the above-styled cause pursuant to Fed.R.Civ.P. 41(a)(1).

By: \_\_\_\_\_

Sean H. McKee

CONNER & WINTERS  
2400 First National Tower  
15 East 5th Street  
Tulsa, Oklahoma 74103-4391

By: \_\_\_\_\_

Lewis N. Carter

DOERNER, STUART, SAUNDERS,  
DANIEL & ANDERSON  
320 South Boston  
Tulsa, Oklahoma 74103

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 13 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

SAMSON RESOURCES COMPANY,

Plaintiff,

vs.

TEXAS INDEPENDENT EXPLORATION,  
INC.,

Defendant.

Case No. 94-C-245K

ENTERED ON DOCKET

DATE JAN 17 1995

**STIPULATION OF DISMISSAL WITH PREJUDICE**

Plaintiff, Samson Resources Company, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, stipulates to the dismissal of the referenced litigation with prejudice. Each party shall bear its own costs and attorneys' fees.

DATED this 13<sup>th</sup> day of January, 1995.

GABLE & GOTWALS

By:



Jack A. Canon (OBA #1464)  
Michael G. Daniel (OBA #13265)  
Samson Plaza  
Two West Second Street  
Tulsa, Oklahoma 74103  
(918) 583-1791

ATTORNEYS FOR THE PLAINTIFF

By:



Joseph W. Morris (OBA #6426)  
John Henry Rule (OBA #7824)  
Kari S. McKee (OBA #14284)  
2000 Bank IV Center  
Tulsa, Oklahoma 74119-5447  
(918) 582-9201

ATTORNEYS FOR THE DEFENDANT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES RANDOLPH CARTER,

Petitioner,

vs.

RONALD THOMPSON,

Respondent.

No. 94-C-957-K

ENTERED ON DOCKET

DATE JAN 17 1995

FILED

JAN 13 1995

Richard M. Lee  
U.S. District Court  
Northern District of Oklahoma

ORDER

On December 21, 1994, the Court ordered Petitioner to address whether he properly challenged his sentence under 28 U.S.C. § 2241. In particular, the Court ordered Petitioner to brief whether the remedy provided by a 28 U.S.C. § 2255 motion would be inadequate or ineffective in his court. In his brief in response, Petitioner concedes that his petition under section 2241 is procedurally incorrect and requests the Court to convert his petition into a motion under § 2255.

Although the substance of Petitioner's claims for relief under section 2255 are before the Court in the instant petition, the filing of a separate motion pursuant to section 2255 is required to place the case in the proper procedural posture. A motion pursuant to section 2255 is not brought against the one in whose custody the prisoner is being held. Moreover, such a motion must be docketed in Petitioner's criminal case.

Accordingly, Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 is hereby **dismissed without prejudice** to Petitioner refiling a motion to vacate, set aside, or correct sentence in his criminal case. The Clerk shall **mail** to the

Petitioner a motion to vacate, set aside, or modify sentence pursuant to 28 U.S.C. § 2255 and information and instructions for filing the same.

SO ORDERED THIS 12 day of January, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE JAN 13 1995

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JAN 12 1995  
Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

TINA DUNN,

Plaintiff,

vs.

THORN AMERICAS, INC., d/b/a,  
RENT-A-CENTER, INC.,

Defendant.

Case No. 94-C-764-BU

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the parties and hereby stipulate to the dismissal of the above-referenced lawsuit in its entirety with prejudice, each party bearing its own costs, expenses, and attorney's fees. A proposed order is attached for the Court's convenience.

LIPE, GREEN, PASCHAL, TRUMP  
& BRAGG, P.C.

By Richard A. Paschal  
Richard A. Paschal, OBA #6927

3700 First National Tower  
15 East 5th Street, Suite 3700  
Tulsa, Oklahoma 74103-4344  
918/599-9400

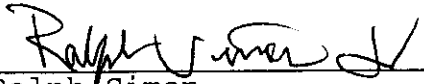
SHOOK, HARDY & BACON P.C.

By Larry M. Schumaker  
Larry M. Schumaker

One Kansas City Place  
1200 Main Street  
Kansas City, Missouri 64105  
816/474-6550

ATTORNEYS FOR DEFENDANT

RALPH SIMON, ATTORNEY AT LAW

By   
Ralph Simon

427 South Boston, Suite 1701  
Tulsa, Oklahoma 74103  
918/583-8008

ATTORNEY FOR PLAINTIFF

FILED

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAN 12 1995

MELISSA WOLFE, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
VERDIGRIS VALLEY SOD FARMS, )  
INC., an Oklahoma corporation, )  
and C. H. SMITH CONSTRUCTION, )  
INC., an Oklahoma corporation, )  
d/b/a VERDIGRIS VALLEY SOD )  
FARMS, )  
Defendant. )

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-399-BU ✓

ENTERED ON DOCKET

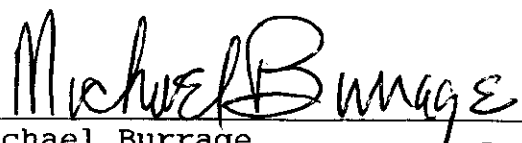
JAN 13 1995  
DATE \_\_\_\_\_

AMENDED ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter which requires payments to be made through January 15, 1996, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case by January 15, 1996, for the purpose of dismissal pursuant to the settlement and compromise, the Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 12 day of January, 1995.

  
\_\_\_\_\_  
Michael Burrage  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 12 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

SEPARATION RECOVERY, a  
Nevada corporation,

Plaintiff,

vs.

CLEAN AMERICAN CORPORATION,  
a Delaware corporation,

Defendant.

Case No. 94-C-317-BU ✓

ENTERED ON DOCKET

DATE JAN 13 1995

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 12 day of January, 1995.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM,  
INC., an Oklahoma corporation,

Plaintiff,

vs.

BROWN FLIGHT RENTAL ONE  
CORP., a foreign corporation; and  
RICHARD BROWN, an individual,

Defendants,

PENTASTAR SERVICES, INC.,  
THOMAS BONNER,  
SCOTT ANDERSON,  
FRED CHESEBRO and  
TOD HAMILTON,

Additional Defendants  
on Counterclaim.

ENTERED ON DOCKET  
DATE 1-13-95

CASE NO. 91-C-993-K

**FILED**  
IN COURT

JAN 11 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

**ORDER APPROVING SETTLEMENT AND JUDGMENT**

The parties' Joint Application to Approve Settlement and Enter Judgment ("Application") is hereby **GRANTED**. Pursuant to and based upon the agreement of the parties, it is ordered, adjudged and decreed as follows:

1. The Court hereby approves the Settlement Agreement and Release which is attached to the Application.

2. Judgment is hereby rendered in favor of plaintiff Thrifty Rent-A-Car System, Inc. ("Thrifty") and against defendant Brown Flight Rental One Corp. in the amount of \$50,000.00 on the breach of contract claims asserted by Thrifty.

3. All other claims asserted herein by Thrifty against Richard Brown and Brown Flight Rental One Corp. are hereby dismissed with prejudice.

4. Judgment is hereby rendered against Richard Brown and Brown Flight Rental One Corp. and in favor of Thrifty Rent-A-Car System, Inc., Pentastar Services, Inc., Thomas Bonner, Scott Anderson, Frederick Chesebro and Tod Hamilton on all of the counterclaims asserted by them herein.

5. All parties shall bear their own costs and attorneys' fees.

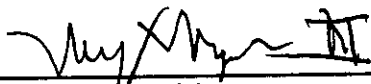
6. All other terms and conditions of the agreement are incorporated herein by reference, and the Court shall retain continuing jurisdiction over this matter and the parties hereto to enforce the agreement, if necessary.

DATED this 11 day of January, 1995.

s/ TERRY C. KERN

TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

STIPULATED AND AGREED TO:

  
James L. Kincaid  
Mack J. Morgan, III

CROWE & DUNLEVY  
Suite 1800  
20 N. Broadway  
Oklahoma City, Oklahoma 73102  
(405) 235-7700

ATTORNEYS FOR PLAINTIFFS  
THRIFTY RENT-A-CAR SYSTEM,  
INC., PENTASTAR SERVICES, INC.,  
THOMAS BONNER, SCOTT  
ANDERSON, FREDERICK  
CHESEBRO, and TOD HAMILTON

  
Drew Neville  
Russell Cook

LINN & NEVILLE, P.C.  
1200 Bank of Oklahoma Plaza  
201 Robert S. Kerr Avenue  
Oklahoma City, Oklahoma 73102-4289  
(405) 239-6781

ATTORNEYS FOR DEFENDANTS  
BROWN FLIGHT RENTAL ONE  
CORP. and RICHARD BROWN

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
JAN 12 1995  
DATE \_\_\_\_\_

JAMES RANDAL JENKINS, individually, and )  
PAMELA LOUISE JENKINS, individually, and )  
JAMES RANDAL JENKINS and PAMELA LOUISE )  
JENKINS, parents and next friend of )  
MITCHELL JENKINS, a minor, and PAMELA )  
LOUISE JENKINS, mother and next friend of )  
TARA ACKLEY and TABITHA ACKLEY, minors, )

Plaintiffs, )

vs. )

DONALD PRIVETT and NORTH AMERICAN )  
VAN LINES, INC., )

Defendants. )

**FILED**

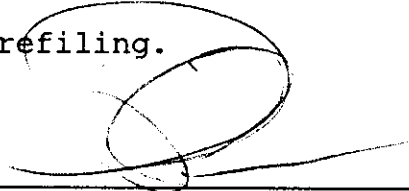
JAN 12 1995

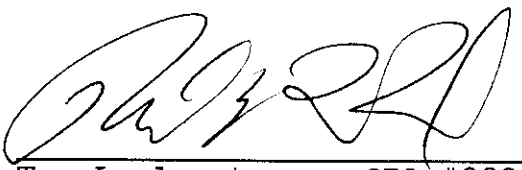
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

No. 93-C-953-K

STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW that Parties to the above-captioned action, by and through their respective attorneys, and stipulate that the above action has been compromised and settled and that the action is to be dismissed with prejudice as to its refiling.

  
\_\_\_\_\_  
Paul B. Naylor, OBA #6589  
NAYLOR & WILLIAMS  
1701 South Boston Avenue  
Tulsa, Oklahoma 74119  
(918) 582-8000  
ATTORNEYS FOR PLAINTIFF


  
\_\_\_\_\_  
Tom L. Armstrong, OBA #329  
Jeannie C. Henry, OBA #12331  
Richard E. Howard, OBA #12709  
TOM L. ARMSTRONG & ASSOCIATES  
601 South Boulder, Suite 706  
Tulsa, Oklahoma 74119-1337  
(918) 587-3939  
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF MAILING

I hereby certify that a true, full and correct copy of the above and foregoing instrument was mailed, postage prepaid, on the 12th day of January, 1995, to:

Paul B. Naylor  
NAYLOR & WILLIAMS, INC.  
1701 South Boston Avenue  
Tulsa, Oklahoma 74119

P. Thomas Thornbrugh  
HOOD, THORNBRUGH & RAYNOLDS  
1914 South Boston Avenue  
Tulsa, Oklahoma 74119

  
Richard E. Howard

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
  
Plaintiff,

vs.

GEORGE G. GRAGG, III;  
A. MICHELLE GRAGG  
aka Adrienne M. Gragg;  
STATE OF OKLAHOMA, ex rel.  
OKLAHOMA TAX COMMISSION;  
CITY OF BROKEN ARROW, Oklahoma  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

**FILED**

JAN 11 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JAN 11 1995

CIVIL ACTION NO. 94-C-545-B

O R D E R

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

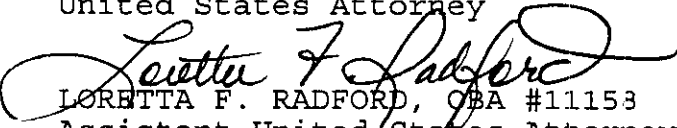
Dated this 11 day of Jan., 1995.

**/s/ THOMAS R. BRETT**

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

  
LORETTA F. RADFORD, OBA #11153  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463  
LFR:flv

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 11 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

SUN COMPANY, INC., (R & M), a Delaware corporation, )  
and TEXACO INC., a Delaware corporation, )

Plaintiffs, )

vs. )

Case No. 94-C-820-B

BROWNING-FERRIS, INC., a Delaware corporation, et al., )

Defendants. )

ENTERED ON DOCKET

DATE JAN 12 1995

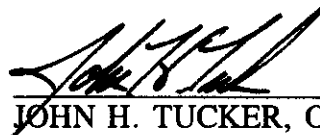
**DISMISSAL WITHOUT PREJUDICE**

Plaintiffs, Sun Company, Inc. (R & M) and Texaco, Inc. hereby dismiss Defendant,  
F.M. Shipley, ONLY without prejudice.

Dated this 10th day of January, 1995.

RHODES, HIERONYMUS, JONES  
TUCKER & GABLE

By

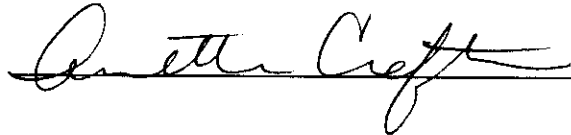


JOHN H. TUCKER, OBA #9110  
BENTON T. WHEATLEY, OBA # 14836  
PO Box 21100  
Tulsa, Oklahoma 74121-1100  
(918) 582-1173

ATTORNEYS FOR PLAINTIFFS,  
SUN COMPANY, INC. (R & M) and  
TEXACO INC.

**CERTIFICATE OF MAILING**

I hereby certify that on this 11 day of January, 1995, I mailed a true and correct copy of the foregoing with proper postage thereon fully prepaid to all parties listed on the attached pages.

A handwritten signature in cursive script, appearing to read "Annette Craft", is written over a horizontal line.

Joseph H. Paulk, OBA# 10110  
Paulk Moles & Boaz  
PO Box 4679  
Tulsa OK 74159-0679  
**Attorney for Defendant, Ameron, Inc.**

Charles V. Eagan  
H. Still Hardwick  
Gable Golden & Nelson  
Suite 4100  
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Tulsa OK 74172-0141  
**Attorneys for Defendant, Anchor Paint Mfg. Co.**

Joseph L. Parker, Jr.  
Anchor Industries, Inc.  
4477 One Williams Center  
Tulsa OK 74172  
**Defendant, Anchor Stone Co.**

Danny P. Richey, OBA# 10458  
Pezold Richey Caruso & Barker  
800 Sinclair Bldg  
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Tulsa OK 74103  
**Attorney for Defendant, Apartment Container Service, Inc.**

David P. Page, OBA# 6852  
Lloyd W. Landreth, OBA# 15886  
J. Randall Miller, OBA# 6214  
Gardere & Wynne LLP  
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Tulsa OK 74103  
**Attorneys for Defendant, Atlantic Richfield Company**

G. Lawrence Fox, OBA# 10301  
Vice President and General Counsel  
Bank IV Oklahoma NA  
PO Box 2360  
Tulsa OK 74101  
**Attorney for Defendant, Bank IV of Oklahoma**

Jeffrey G. Levinson  
Dwight L. Smith  
Levinson & Smith  
35 E 18th St  
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Terence P. Brennan  
320 S Boston Ste 1103-3  
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**Attorney for Defendant, Borg Industrials Group, Inc. d/b/a American Container Services**

Kirk Clausing  
J S Lewis Ste 240  
Tulsa OK 74104  
**Attorney for Defendant, Brierly Plumbing Technologies Corp.**

Jonathan R. Haden  
William G. Beck  
L.J. Buckner, Jr.  
Lathrop & Norquist L C  
2345 Grand Boulevard Ste 2500  
Kansas City MO 64108-2684  
and  
Robert A. Franden, OBA# 3086  
Tony M. Graham, OBA# 3524  
Feldman Hall Franden Woodward & Farris  
1400 Park Centre  
525 S Main St  
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**Attorneys for Defendant, Browning-Ferris, Inc.**

Rodney A. Edwards, OBA# 2646  
5100 E Skelly Dr Ste 645  
Tulsa OK 74135-6677  
**Attorney for Defendant, Carnes Bros. Constr. Co.**

Compass Industries  
c/o Secretary of State  
101 State Capitol  
2300 N Lincoln Blvd  
Oklahoma City OK 73105-4897  
**Defendant, Compass Industries**

Ada Farnan  
President  
Consolidated Cleaning Service, Inc.  
7310 W 26th St  
Tulsa OK 74107  
**Defendant, Consolidated Cleaning Service Company, Inc.**

Gerald G. Stamper, OBA# 8546  
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Suite 400 Old City Hall  
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**Attorney for Defendant, Cowen Construction, Inc.**

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Clark & Williams  
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Tulsa OK 74135  
**Attorney for Defendant, Crain Displays & Exhibits, Inc.**

William C. Anderson, OBA# 292  
G. Michael Lewis, OBA# 5404  
Russell W. Kroll, OBA# 15281  
Doerner, Stuart, Saunders, Daniel & Anderson  
320 S Boston Ste 500  
Tulsa OK 74103  
**Attorneys for Defendant, Dow Chemical Company d/b/a Dow Industrial Service**

Steven M. Harris, OBA# 3913  
Michael D. Davis, OBA# 11282  
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2431 E 61st St Ste 260  
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Covington & Poe  
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**Attorneys for Defendant, Empire Roofing & Insulation Co.**

Thomas M. Affeldt  
Savage, O'Donnell, Scott, McNulty, Affeldt & Gentges  
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Gerald G. Stamper, OBA# 8546  
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**Attorney for Defendant, Fleming Building Company, Inc.**

Charles Forhan d/b/a D & W Exterminating  
2235 E 6th St  
Tulsa OK 74104  
**Defendant, Charles Forhan d/b/a D & W Exterminating**

Danny P. Richey, OBA# 10458  
Pezold Richey Caruso & Barker  
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**Attorney for Defendant, Odean Garrison**

Phil Frazier  
1424 Terrace Dr  
Tulsa OK 74104  
**Registered Service Agent for Defendant, Langston Contractors, Inc.**

Richard Carpenter  
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1516 S Boston Ste 205  
Tulsa OK 74119-4013  
**Attorney for Defendant, Mid-America Stockyards, Inc.**

Gerald G. Stamper, OBA# 8546  
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**Attorney for Defendant, National Tank Co.**

Thurman Bricker  
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Skiatook OK 74070  
**Registered Service Agent for Defendant, O.K. Tank Trucks, Inc.**

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Pezold Richey, Caruso & Barker  
800 Sinclair Building  
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Tulsa OK 74103  
**Attorneys for Defendant, Oil Capitol Trash Services, Inc.**

R. Casey Cooper, OBA# 1897  
R. Kevin Layton, OBA# 11900  
Boesche McDermott & Eskridge  
100 W 5th Ste 800  
Tulsa OK 74103-4216  
**Attorneys for Defendant, Ozark Mahoning Co.**



Gerald G. Stamper, OBA# 8546  
Nichols Wolfe Stamper Nally Fallis &  
Robertson, Inc.  
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Tulsa OK 74103-5010

Charles M. Sublett  
Sublett and Shafer, P.C  
320 S Boston Suite 805  
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**Attorneys for Defendant, Peevy Constr. Co.,  
Inc.**

Sam T. Allen, III, OBA# 231  
Loeffler Allen & Ham  
PO Box 230  
Sapulpa OK 74067  
**Attorney for Defendant, Petroleum  
Contractors Corporation**

John R. Paul, OBA# 6971  
Richards Paul Richards & Siegel  
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Tulsa OK 74103-5118  
**Attorney for Defendant, Phillips & Lomax  
Agency, Inc.**

William C. Anderson, OBA# 292  
G. Michael Lewis, OBA# 5404  
Russell W. Kroll, OBA# 15281  
Doerner, Stuart, Saunders, Daniel & Anderson  
320 S Boston Ste 500  
Tulsa OK 74103  
**Attorneys for Defendant, Public Service  
Company of Oklahoma**

William C. Anderson, OBA# 292  
G. Michael Lewis, OBA# 5404  
Russell W. Kroll, OBA# 15281  
Doerner Stuart Saunders Daniel & Anderson  
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Tulsa OK 74103  
**Attorneys for Defendant, Steve Richey d/b/a  
Richey Refuse Service**

Ronald D. Cates, OBA# 1565  
Suite 680 Parkcentre  
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Tulsa OK 74103  
**Attorney for Defendant, City of Sand Springs**

Danny P. Richey, OBA# 10458  
Pezold Richey Caruso & Barker  
800 Sinclair Building  
6 E 5th St  
Tulsa OK 74103  
**Attorney for Defendant, Ross Scoggins, Sr.**

Danny P. Richey, OBA# 10458  
Pezold Richey Caruso & Barker  
800 Sinclair Building  
6 E 5th St  
Tulsa OK 74103  
**Attorney for Defendant, John D. Shipley**

William C. Anderson, OBA# 292  
G. Michael Lewis, OBA# 5404  
Russell W. Kroll, OBA# 15281  
Doerner, Stuart, Saunders, Daniel & Anderson  
320 S Boston Ste 500  
Tulsa OK 74103  
**Attorney for Defendant, Robert E. Sparks  
d/b/a Tulsa Industrial Service**

Kenneth R. Johnson, OBA# 4703  
Johnson & Nimmo  
331 S Rennie  
Drawer 1690  
Ada OK 74820  
**Attorney for Defendant, Stallings, Inc.**

R. Casey Cooper, OBA# 1897  
R. Kevin Layton, OBA# 11900  
Boesche McDermott & Eskridge  
100 W 5th St Ste 800  
Tulsa OK 74103-4216  
**Attorneys for Defendant, Sun Chemical  
Corporation**

Scott Pruitt  
5727 S Lewis Ste 640  
Tulsa OK 74105  
**Attorney for Defendant, Tulsa Rig & Iron**

Robert L. Roark  
John S. Gardner  
McKinney Stringer & Webster  
101 N Broadway Ste 800  
Oklahoma City OK 73102  
and  
Patrick H. Kernan  
McKinney Stringer & Webster  
401 S Boston  
Ste 2100 Mid Continent Tower  
Tulsa OK 74103  
**Attorneys for Defendant, Union Carbide Corp.**

Steven M. Harris  
Michael D. Davis  
Doyle & Harris  
2431 E 61st Ste 260  
Tulsa OK 74136  
**Attorneys for Defendant, Vacuum and  
Pressure Tank Trucks Services, Inc.**

Robert C. Gist  
12809 Plum Hollow Drive  
Oklahoma City OK 73142-5147  
and  
Lisa S. Zebovitz  
Senior Environmental Counsel  
Waste Management, Inc.  
3003 Butterfield Rd  
Oak Brook IL 60521  
**Attorneys for Waste Management of  
Oklahoma, Inc.**

Steven M. Harris  
Michael D. Davis  
Doyle & Harris  
2431 E 61st Ste 260  
Tulsa OK 74136  
**Attorneys for Defendant, Glenn E. Wynn, Jr.**

ENTERED ON DOCKET  
JAN 12 1995  
DATE

IN THE UNITED STATES DISTRICT COURT,  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JAN 12 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

DEBORAH L. FOSTER,

Plaintiff,

vs.

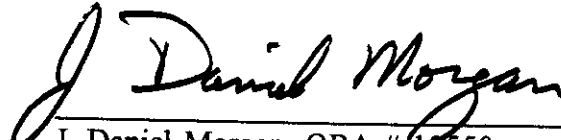
TEXACO REFINING AND MARKETING  
INCORPORATED,

Defendant.

Case No. 94-C-225-K

**STIPULATION OF DISMISSAL WITH PREJUDICE**

The parties jointly stipulate that all claims and causes of action are hereby dismissed with prejudice.



J. Daniel Morgan, OBA # 40550

**GABLE & GOTWALS**

2000 Bank IV Center

15 West Sixth Street

Tulsa, Oklahoma 74119-5447

(918) 582-9201

**ATTORNEYS FOR DEFENDANT**



Jeff Nix

Joy Williams

2121 S. Columbia, Suite 710

Tulsa, OK 74114

**ATTORNEYS FOR PLAINTIFF**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
JAN 11 1995 *ll*

SUSAN ELAINE ROBINSON, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FGB REALTY ADVISORS, INC., )  
 )  
Defendant. )

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-834-BU ✓

ENTERED ON DOCKET  
DATE 1-12-95

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 11 day of January, 1995.

*Michael Burrage*  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAN 12 1995

DOLLAR SYSTEMS, INC.,  
a Delaware corporation,

Plaintiff,

v.

GND RENT-A-CAR, INC.,  
PATRICK GRAHAM, AND  
EDWIN SCHATMAN,

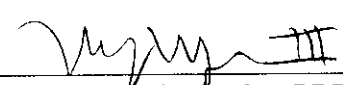
Defendant.

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

Case No. 94-C-634-E

NOTICE OF DISMISSAL

Plaintiff, Dollar Systems, Inc., by counsel,  
pursuant to Federal Rule of Civil Procedure 41, hereby  
dismisses the above-captioned action with prejudice, with  
each party to bear its own costs and attorneys' fees.

  
\_\_\_\_\_  
MACK J. MORGAN, III

- Of the Firm -

CROWE & DUNLEVY  
A Professional Corporation  
1800 Mid-America Tower  
20 North Broadway  
Oklahoma City, Oklahoma 73102  
(405) 235-7700

ATTORNEYS FOR DOLLAR SYSTEMS,  
INC.

ENTERED ON DOCKET

DATE 1-12-95

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

LUCILLE M. POWDRILL,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN  
SERVICES, Donna Shalala, Secretary,

Defendant.

ENTERED ON DOCKET

DATE JAN 11 1995

93-C-1085-

**FILED**

JAN 11 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

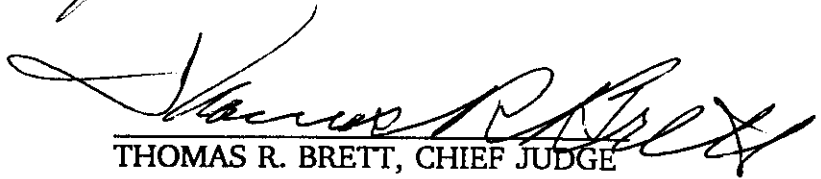
The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed December 16, 1994 in which the Magistrate Judge recommended that the Secretary's decision be **remanded** so that the ALJ can (1) re-examine Dr. De Benedetti's findings and the balance of the evidence in light of those findings; and (2) hold a supplemental hearing where the Vocational Expert should again testify, taking into consideration Dr. DeBenedetti's findings.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the recommendations of the Magistrate Judge are hereby adopted as set forth above.

SO ORDERED THIS 11 day of Jan, 1995.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

LUCILLE M. POWDRILL,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN  
SERVICES, Donna Shalala, Secretary,

Defendant.

93-C-1085-B

JAN 11 1995  
Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ENTERED ON DOCKET**  
**DATE JAN 11 1995**

JUDGMENT

This action having come before the court for consideration, IT IS ORDERED,  
ADJUDGED AND DECREED that judgment is entered in favor of the Plaintiff, Lucille M.  
Powdrill, and against the Defendant, Department of Health and Human Services.

The case is remanded per the Order of this date, 1995.

DATED THIS 11 day of Jan, 1995.

  
THOMAS R. BRETT, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HOWLIN' HITS MUSIC, INC.,  
SEVENTH SON MUSIC, MATTIE  
RUTH MUSICK, CROSS KEYS  
PUBLISHING CO., INC., MAJOR  
BOB MUSIC, and POLYGRAM  
INTERNATIONAL PUBLISHING, INC.,

Plaintiffs,

v.

DEAN YECKLEY, Individually,  
and DEAN YECKLEY, as the  
Guardian of MARY DONAHEY,  
d/b/a VEGAS CLUB,

Defendants.

**FILED**

JAN 10 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

No. 94-C-981-B

ENTERED ON DOCKET

DATE JAN 11 1995

ORDER OF DISMISSAL WITH PREJUDICE

The above styled and numbered cause comes before the Court pursuant to the plaintiffs' Application for Order of Dismissal with Prejudice. Upon review of the plaintiffs' Application, and for good cause shown, the Court finds the same should be, and hereby is, granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this case is hereby dismissed with prejudice to its refiling, with each party to bear their own costs.

  
UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
JAN 11 1995  
DATE \_\_\_\_\_

JOSEPH ANGELO DICESARE,

Plaintiff,

vs.

No. 92-C-269-K ✓

LARRY D. STUART, RENE P.  
HENRY, JR., UNKNOWN SHERIFF  
AND DEPUTIES OF THE OSAGE  
COUNTY SHERIFF'S DEPARTMENT,  
THREE UNKNOWN COUNTY  
COMMISSIONERS, UNKNOWN OWNERS  
OF THE COLLINSVILLE SALES  
BARN, AN UNKNOWN VETERINARIAN,  
AND THE COUNTY OF OSAGE  
COUNTY, OKLAHOMA,

Defendants.

FILED

JAN 11 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE,

Plaintiff,

vs.

No. 92-C-905-K

STANLEY GLANZ, SHERIFF OF  
TULSA COUNTY, and BILL O'DELL,  
DEPUTY SHERIFF OF TULSA  
COUNTY,

Defendants.

JUDGMENT

This matter came before the Court for consideration of the defendants' motions for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith, the Court finds summary judgment is appropriate in favor of defendants Stanley Glanz, Sheriff of Tulsa County and Bill O'Dell, Deputy Sheriff of Tulsa County, on grounds of qualified immunity and in favor of all

defendants based upon plaintiff's lack of standing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendants and against the plaintiff.

ORDERED this 10 day of January, 1995.

A handwritten signature in black ink, appearing to read "Terry C. Kern", is written over a horizontal line.

TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE,

Plaintiff,

vs.

LARRY D. STUART, RENE P.  
HENRY, JR., UNKNOWN SHERIFF  
AND DEPUTIES OF THE OSAGE  
COUNTY SHERIFF'S DEPARTMENT,  
THREE UNKNOWN COUNTY  
COMMISSIONERS, UNKNOWN OWNERS  
OF THE COLLINSVILLE SALES  
BARN, AN UNKNOWN VETERINARIAN,  
AND THE COUNTY OF OSAGE  
COUNTY, OKLAHOMA,

Defendants.

ENTERED ON DOCKET

DATE JAN 11 1995

No. 92-C-269-K

**FILED**

JAN 11 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JOSEPH ANGELO DICESARE,

Plaintiff,

vs.

STANLEY GLANZ, SHERIFF OF  
TULSA COUNTY, and BILL O'DELL,  
DEPUTY SHERIFF OF TULSA  
COUNTY,

Defendants.

No. 92-C-905-K ✓

**ORDER**

Before the Court are motions for summary judgment of various defendants and of plaintiff. The Honorable Thomas R. Brett previously granted summary judgment in favor of all defendants, which decision was reversed by the United States Court of Appeals for the Tenth Circuit in DiCesare v. Stuart, 12 F.3d 973 (10th Cir.1993). By Order of June 13, 1994, the case was transferred to the undersigned. By Orders of October 6, 1994, this Court granted

the motion for summary judgment of defendants Stuart and Henry and granted summary judgment in part to Osage County officials on qualified immunity grounds.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

The appellate opinion sets out the factual background of this action. 12 F.3d at 975-76. To summarize, the Osage County Sheriff's Department received a complaint about a stray horse. Attempting to locate the horse's owner, law enforcement officers entered certain property upon which they found several dead horses and other starving horses. Twelve of the living horses were in poor condition, but a thirteenth horse appeared healthy. The Osage County officers enlisted the aid of Tulsa County Deputy O'Dell and a veterinarian. The living horses were seized and taken to the Collinsville Sale Barn to be fed and treated. Several of the horses had to be euthanized. Pursuant to state law, the remaining

horses were sold after issuance of notice for a total of \$2,730. From this amount, the livestock commission, insurance, feed, yardage, and veterinary services were paid, resulting in a net loss to the sheriff's department of \$390.40.

Plaintiff brought the present action pursuant to 42 U.S.C. §1983. On appeal, the United States Court of Appeals for the Tenth Circuit found apparently legitimate claims regarding the warrantless seizure of the horses and the failure of the state statutory scheme for sale of unclaimed animals to provide an opportunity for hearing. 12 F.3d at 977-78. The appellate decision remanded the case to this Court to "determine which, if any, of defendants are entitled to qualified immunity . . . and whether all defendants are sufficiently connected to the constitutional violations to hold them liable." Id. at 978.

First, the Court considers the motion to dismiss or in the alternative for summary judgment of defendants Stanley Glanz and Bill O'Dell. Movants raise the defense of qualified immunity. When the defense of qualified immunity has been raised by the defendant, the plaintiff then has the burden to show with particularity facts and law establishing the inference that the defendants violated a constitutional right. Once the plaintiff has sufficiently alleged the conduct violated clearly established law, then the defendant bears the burden, as a movant for summary judgment, of showing no material issues of fact remain that would defeat the claim of qualified immunity. Walter v. Morton, 33 F.3d 1240, 1242 (10th Cir.1994). Whether an official protected by

qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action. Applewhite v. United States Air Force, 995 F.2d 997, 1000 (10th Cir.1993)(citing Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)). The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. Applewhite, 955 F.2d at 1000 (quoting Hunter v. Bryant, 112 S.Ct. 534, 537 (1991)). Moreover, plaintiff must show an individual defendant had an "affirmative link" to the constitutional violations. Winters v. Board of County Commissioners, 4 F.3d 848, 855 (10th Cir.1993).

Movants assert Glanz had virtually no involvement in the litigated events and O'Dell lacked sufficient involvement to face liability under §1983. Defendants present as uncontested fact, and plaintiff has offered no contrary evidence, that the Osage County deputies requested assistance from Tulsa County authorities because the Osage County deputies did not have a stock trailer capable of transporting the horses. (Brief #114 at 3, ¶13). O'Dell's affidavit states, and again plaintiff has not presented contradictory evidence, "I did not participate in any decisions to enter the property" (O'Dell affidavit at ¶6) and "I did not participate in any decision to seize or transport the horses from the scene" (Id. at ¶7). In sum, Glanz did not participate in the seizure, transportation or sale of the horses; O'Dell's only involvement was to transport the surviving horses to the

Collinsville Sale Barn. The Court concludes plaintiff has failed to demonstrate an affirmative link between any actions of the movants and the alleged constitutional violations. Moreover, such actions as were taken by O'Dell satisfy the "objective legal reasonableness" standard. Summary judgment is appropriate in favor of both Glanz and O'Dell.

Also before the Court is the motion for summary judgment of defendants Sheriff, Deputies, County Commissioners of Osage County and the County of Osage (#117). As one branch of their argument, movants contend plaintiff cannot prove actual injury because, under these facts, the alleged violation preserved the value of the property. In other words, if the horses had not been seized, they all would have starved to death and been of no value to plaintiff. See Bolden v. Septa, 21 F.3d 29, 34 (3rd Cir.1994) ("A plaintiff in a section 1983 case cannot recover for emotional distress unless he or she presents evidence of 'actual injury'"). While the argument is persuasive as to actual injury, it does not mandate dismissal. Plaintiff has alleged violation of constitutional rights; it is established "nominal damages are recoverable without proof of actual injury. . . ." O'Connor v. City and County of Denver, 894 F.2d 1210, 1215 (10th Cir.1990). Plaintiff would be entitled to proceed in seeking recovery of nominal damages.

The second branch of movants' argument is plaintiff lacks standing because he is not the owner of the horses. Defendants Glanz and O'Dell have adopted this portion of the argument in a motion of their own (#125). Standing represents a jurisdictional

requirement which remains open to review at all stages of the litigation. National Org. for Women, Inc., v. Scheidler, 114 S.Ct. 798, 802 (1994). Plaintiff carries the burden of establishing the elements of standing. Mount Evans Co. v. Madigan, 14 F.3d 1444, 1450 (10th Cir.1994). One of those elements is "injury in fact." Id. If plaintiff did not own the horses, he did not suffer injury in fact from either the seizure of the horses or their sale.

The affidavit of Osage County Deputy John Ferguson states in paragraph 17: "In continued efforts to contact the owners of the horses, on November 20, 1990, I located Joe and Patricia DiCesare. Mr. and Mrs. DiCesare, who are the parents of the Plaintiff, advised me that the animals were the property of a corporation. I learned that the parents were part of the corporation but accepted no responsibility for the animals." In a transcript of the interview conducted with Mr. DiCesare, Sr., plaintiff's father states "those horses is [sic] owned by a corporation out of Texas". Further, "I had co signed a \$177,000.00 note on them horses at the bank. . . ." (Exhibit R to pleading #136, Response of Defendants to Plaintiff's Motion for Summary Judgment). In a self-described "affidavit" executed by Mr. DiCesare, Sr., and attached to plaintiff's motion for summary judgment, the father states "I hold the original horse registration papers that name Joseph Angelo DiCesare as legal owner. I have ordered pedigrees on these horses, and the pedigrees should be here in approx. 10 days. At that time, copies of the pedigrees will be submitted to the court." (Exhibit G to pleading #115). No such pedigrees have ever been submitted.



Furthermore, this "affidavit" is unsworn; its contents are not stated to be true and correct under penalty of perjury as permitted under 28 U.S.C. §1746. As such, it must be disregarded as summary judgment proof. See Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300, 1305-06 (5th Cir.1988). See also Flowers v. Abex Corp., 580 F.Supp. 1230, 1233 n.2 (N.D.Ill.1984) (merely notarizing signature does not transform document into affidavit that may be used for summary judgment purposes).

On July 31, 1984, C.J.M. Investments, Inc., Joe DiCesare, Sr. and Patricia DiCesare entered into a security agreement and mortgage with McDonald County Mercantile Bank. The mortgage related to the Osage County property upon which the horses were ultimately found. The security agreement granted the Bank a security interest in, among other things, the horses owned by C.J.M. Investments, Inc. The company ultimately defaulted on the security agreement and mortgage. The Bank obtained judgment thereon on July 14, 1989. On October 10, 1990, Joe DiCesare, Sr. executed a Contract for Deed on behalf of C.J.M. Investments, Inc. for the purchase of real property in Osage County, Oklahoma. It is undisputed C.J.M. Investments, Inc., as opposed to plaintiff in the case at bar, owned the real property upon which the horses were found. (Plaintiff's Motion for summary judgment, pleading #115, at 3, ¶13).

On January 22, 1991, the Bank served an execution on the Sheriff of Osage County commanding the goods and chattels of C.J.M. Investments, Inc., Joe DiCesare, Sr. and Patricia DiCesare, be

returned to the Bank, "specifically including but not limited to proceeds from the sale of horses belonging to the defendants now in the hands of the District Attorney's office and/or the Osage County Clerk. . ." (Exhibit K to pleading #118). On February 16, 1994, Joe DiCesare, Sr., sent letters to the Internal Revenue Service on behalf of C.J.M. Investments, Inc., requesting an audit of the defendants in the present case for not reporting income of \$250,000.00 for "horses stolen from the DiCesare farm." (Exhibit M to pleading #118).

In response, plaintiff has submitted registration papers of thirteen horses, which list plaintiff as owner. The documents are dated many years ago, and in any event plaintiff has presented nothing demonstrating the thirteen horses identified in the registration papers were in fact the thirteen horses seized and sold by defendants. Plaintiff disputes the validity of the judgment obtained by the Bank. However, he also states: "Yes, Plaintiff admits some money, if any, may be owed to McDonald County Bank on the horses, but until McDonald County Bank obtains a valid foreclosure judgment on these horses before a proper court then the horses in question are and belong to Joseph Angelo DiCesare the plaintiff in this case just like the registration papers state!" (Pleading #120 at 2) (emphasis in original). In the same vein, he states "McDonald County Bank may have a security interest in the horses; however, the bank has never took a forclosure [sic] judgment against these horses and until that happens plaintiff is the recognized owner." (Id. at 3) (emphasis in original).

Plaintiff's argument proves too much. In disputing the propriety of the foreclosure judgment, he concedes the existence of the Bank's security interest in the horses.<sup>1</sup> The security agreement does not list plaintiff as a party thereto; it lists C.J.M. Investments, Inc. Plaintiff contends he nevertheless has standing to sue as "the sole member of C.J.M. Investments, Inc." (Pleading #115 at 3). At the time of the security agreement, Joe DiCesare, Sr. claims to have been the president of the corporation. (Defendants' Statement of Uncontroverted Facts, Fact 1 and attachments thereto, Pleading #118 at 2). In any event, a shareholder has no standing to bring claims for an injury suffered by the corporation. Gersman v. Group Health Ass'n, Inc., 931 F.2d 1565, 1569 (D.C.Cir. 1991), vacated on other grounds, 112 S.Ct. 960 (1992); Taha v. Engstrand, 987 F.2d 505, 507 (8th Cir.1993). Plaintiff lacks the requisite standing to pursue the present action.

It is the Order of the Court that the motions for summary judgment of defendants Stanley Glanz and Bill O'Dell (#113 and #125) and the motion for summary judgment of the Osage County defendants (#117) are hereby GRANTED. The motions of the plaintiff for summary judgment (##115 and 135) are hereby DENIED.

It is the further Order of the Court that the application of the plaintiff for leave to appeal in forma pauperis (#141) is

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<sup>1</sup>Plaintiff asserts the Bank claimed four horses which were free and clear of any liens or mortgage. (Pleading #115 at 4, ¶23). No evidence is presented beyond his own assertion, and he has made no showing any of these four were among the horses seized and sold.

hereby GRANTED.

It is the further Order of the Court that, a final Order having been entered, all other pending motions are declared moot.

ORDERED this 10 day of January, 1995.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE